The Digest of Justinian

Volume 2

English-language translation edited by

Alan Watson

THE DIGEST OF JUSTINIAN

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TRANSLATION EDITED BY

ALAN WATSON

VOL. 2

PENN

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PREFACE TO THE PAPERBACK EDITION

This is a corrected edition, minus the Latin text, of the four-volume *The Digest of Justinian*, Latin text edited by Theodor Mommsen with the aid of Paul Krueger, English translation edited by Alan Watson, published by University of Pennsylvania Press in 1985.

This edition incorporates a number of corrected translations. I am grateful to all who called suggested changes to my attention, and in particular to Tony Honoré and Olivia Robinson.

The biggest change has been a new translation by Sebastian and Olivia Robinson of the *Dédoken*, the Greek version of the preface, "The Confirmation of the *Digest*." The previous edition repeated the translation of the rather different Latin preface.

A note about the appearance of the pages. The pagination of the Mommsen edition has been maintained, as was done in the original four-volume hardcover edition. As a result, the pages of the translation vary in length.

ALAN WATSON

GLOSSARY

Abolitio. See Accusatio.

Acceptilatio (Formal Release). The method by which a creditor freed a debtor from his obligation under a verbal contract [*stipulatio* q.v.] producing the same effects as performance. *See D.*46.4.

Accessio (Accession). A general term for the acquisition of ownership by joining property to or merging it with something already owned by the acquirer. *See D.*41.1.

Accusatio (Accusation). The bringing of a criminal charge. Normally (exclusively until the early empire) this was left to the initiative of a private citizen acting as accuser [*delator*]. If a magistrate accepted the charge, he ordered its registration [*inscriptio*] on an official list. It could be removed from the list and so annulled [*absolutio*] during a public amnesty, or where the accuser withdrew the charge with the permission of the court. Unjustified withdrawal was a crime in itself [*tergiversatio*]. *See D.*48.2,16.

Actio Arbitraria. An action in which the judge could order the defendant to restore or produce the property at issue. If he failed to do so, the final judgment penalized him in various ways. *See D.*6.1.35.1; *D.*4.2.14.4.

Actio Civilis. See Ius Civile.

Actio Confessoria. See Servitus.

Actio Contraria. An action given to certain persons in particular legal situations where the normal direct action lay against them. *See* tutors [*tutor* q.v.] *D.* 27.4; depositees *D.*16.3; borrowers for use *D.*13.6.; creditors in the contract of *pignus* [q.v.] *D.*13.7.

Actio Famosa. See Infamia.

Actio in Factum. An action given originally by the *praetor* [q.v.] on the alleged facts of the case alone, where no standard civil law [*ius civile* q.v.] action was directly applicable. The expression *actio utilis* is also found, referring to a praetorian action which extended the scope of an existing civil law action, for example, by means of a fiction. The exact difference, if any, between this and the *actio in factum* is not known. *See D.*9.2.

Actio in Personam (Personal Action). An action based on an obligation of the defendant, whether this arose from a contract, delict, or other legal circumstance. Such an action lay only against the person under the obligation. Cf. *Actio in Rem.*

Actio in Rem (Real Action). An action asserting ownership of property, or other related though more limited rights over it, for example, a servitude [*servitus* q.v.]. Such an action lay against anyone withholding the property. Cf. *Actio in Personam.*

Actio Negatoria. See Servitus.

Actio Popularis. A penal action which could be brought by any person to protect the public interest in certain circumstances. The penalty was often paid to the complainant. *See D.*47.23.

Actio Praescriptis Verbis. An action given to a person after he had performed his part of the bargain under a contract which was not one of the standard types recognized by Roman law. *See D.*19.5.

Actio Utilis. See Actio in Factum.

Addictio in Diem. An agreement allowing a seller to set the sale aside if he received a better offer within a certain time. *See D.*18.2.

Ademptio (Ademption). The revocation, express or implied, of any disposition, usually a legacy. *See D.*34.4.

Adiudicatio (Adjudication). The order given by a judge [*iudex* q.v.] to settle certain proceedings between claimants over common property or between neighbors over boundaries. *See D.*10.2–3.

Adoptio (Adoption). A type of adoption where a dependent person [*alieni iuris* q.v.] was transferred from one family to another. This involved a change of *paterfamilias* [q.v.]. Adopted children were normally in the same legal position as natural children. Cf. *adrogatio* though the term *adoptio* is sometimes used to cover both. *See D.*1.7.

Adrogatio (Adrogation). A type of adoption where an independent person [*sui iuris* q.v.] joined a family, coming under parental power [*patria potestas* q.v.]. This could only be done to save a family from extinction and many restrictions were placed upon it. *See D.*1.7.

Adulterium (Adultery). This was made a criminal offense for a married woman by statute. Her husband was required to divorce and prosecute her, and her father could kill her and her partner with impunity in certain circumstances. *See D.*48.5.

Aedilis (Aedile). A magistrate of the republic whose duties were connected with the general management of daily life in the city, including some police work and the supervision of streets and markets. One type, the curule aediles, issued an edict [*edictum* q.v.] in connection with the latter which greatly influenced the law on sale and delictal liability for animals. The duties of the aediles were gradually taken over by the various types of prefect [*praefectus* q.v.] during the empire. *See D.*1.2.2.26; *D.*21.1.

Aestimatum. A transaction in which one person receives property from another on the basis that, within a specified time, he will either return the property or pay an agreed price. *See D.*19.3.

Agnatus (Agnate). A person related through the male line, whether by birth or adoption, to a common male ancestor. This is an important relationship throughout Roman law, especially in connection with the law of succession. Cf. also *paterfamilias.*

Alieni Iuris (Dependent). Subject to the legal power of someone else, either parental power [*patria potestas* q.v.] in the case of a son-in-power [*filiusfamilias* q.v.] and other descendants or the power of a master where slaves were concerned. Various legal disabilities were involved in either case. *See D.*1.6.

Aureus. See Solidus.

Bonae Fidei Iudicia (Actions of Good Faith). Certain contractual actions, for example, on sale, and certain quasi-contractual ones where the judge [*iudex* q.v.] had to take

account of what ought to be done or given in good faith (*bona fides*) by the parties. This gave the judge wide discretion as to the amount of damages he could award. He could also take account of any defense [*exceptio* q.v.] even where it had not been expressly stated by the defendant.

Bonorum Possessio. A type of possession granted originally by the *praetor* [q.v.] giving rise to an extended or sometimes alternative system of succession, both testate and intestate, to that provided by the civil law [*ius civile* q.v.]. It was protected by an *interdictum* [q.v.] and an action. *See D.*37.1.

Calumnia. (a) In private law, vexatious litigation or receiving money for this purpose. (b) In criminal law, the offense of maliciously or recklessly bringing a false criminal charge. *See D.*3.6.

Capitalis (Capital). A criminal matter where the penalty is death, loss of liberty, or loss of citizenship.

Capitis Deminutio (Change of Civil Status). A loss of or change in one or more of the three basic elements of civil status, that is, freedom, citizenship, and membership of a family. *See D.*4.5.

Castigatio (Corporal Punishment). This took a number of forms: *flagellatio* was generally a whipping for slaves; *fustigatio* was beating with a rod or club, mainly a military punishment; *verberatio* involved multiple lashes and seems to have been severe.

Cautio. (a) A guarantee, either real or personal, that certain duties will be fulfilled. (b) A written document providing evidence of a contract, usually *stipulatio* [q.v.].

Census (Census). A public register of citizens, which estimated their property holdings and so assigned them to the various social classes. *See D.*50.15.

Codex. A collection, official or unofficial, of imperial enactments rather than a complete statement of the law as in a modern "code." *See* preface.

Cognitio. (a) A type of civil procedure, often referred to as *extra ordinem*, signifying its distinctness from the Formulary System [*formula* q.v.] of classical times, which it replaced in the third century A.D. The main difference was that under the *Cognitio* System the whole proceedings took place before an imperial magistrate. (b) The term is also used in a more general way in administrative and crimnal proceedings to cover the competent area of a judicial inquiry, or the investigation itself.

Collatio Bonorum. A contribution in respect of prior gifts which was required of emancipated [*emancipatio* q.v.] children who wished to benefit by intestate succession to their father. *See D.*37.6.

Collegium (Association). Any association, public or private, for religious, professional, or other purposes. Legal restrictions were placed on such associations to prevent subversive activities. *See D.*47.22.

Compensatio (Set-Off). The reduction of any claim by taking into account the defendant's counterclaim based on another transaction. *See D.*16.2.

Concubinatus (Concubinage). A legally and socially recognized monogamous relationship short of marriage. *See D.*25.7.

Condictio. A type of action alleging a civil law [*ius civile* q.v.] debt without mentioning any cause of action, available not only as a contractual remedy, but also on a quasi-contractual basis, where unjustified enrichment could be shown. Although its form was always the same, its name varied according to the situation involved, for example, the *condictio* for money not due [*indebiti*], that is, money paid in error. *See D.*12.4–13.3.

Constitutio. The general word for imperial legislation of all kinds. *See D.*1.4.

Constitutum Debiti. A pact [*pactum* q.v.] consisting of an agreement to pay an existing debt, incurred by the party himself or some other person, at an agreed time. It gave rise to an *actio in factum* [q.v.] for half as much again as the original debt. *See D.*13.5.

Consul (Consul). The title of the two supreme magistrates of the republican constitution, elected annually. Consuls continued to be elected during the empire with various administrative and judicial powers, but the position became increasingly an honorary one until it was abolished by Justinian. *See D.*1.10.

Conubium. The right to contract a civil law [*ius civile* q.v.] marriage, possessed generally only by Roman citizens.

Crimem (Crime). This term can denote a criminal charge or criminal proceedings as well as the crime itself. *See D.*47.11.

Cura, Curatio (Care). These terms were applied to various institutions whereby the well-being and/or property of certain persons were legally safeguarded by someone else, a *curator.* The most important forms were care of a lunatic, of a spendthrift, and the guardianship of an independent [*sui iuris* q.v.] person who was a *minor* [q.v.]. *See D.*27.10; *D.*4.4.

Curator. See Cura.

Decurio (Decurion). A member of a municipal council. This body decided all local matters. During the later empire the office became more burdensome than desirable in many places. *See D.*50.2.

Defensor (Defender). A person who defends another's interests at a trial, often because of his legal relation to him, for example, as *tutor* [q.v.]. *See D.*3.3.

Delator. See Accusatio.

Delegatio. A form of novation [*novatio* q.v.] in which the alteration consisted of a change of the creditor or the debtor in relation to the other party. *See D.*46.2.

Deportatio (Deportation). The punishment of perpetual banishment. It was the most severe of kinds of banishment, since it involved confinement to a fixed place, confiscation of property, and loss of citizenship. *See D.*48.22.

Dies utiles. The days on which legal proceedings could be brought.

Divus (Deified). A title granted to an emperor after death if he had been officially consecrated as a state deity.

Edictum (Edict). A proclamation by a magistrate or the emperor. In the republic, the edicts which had the greatest effect on private law were those of the *praetores* [q.v.; see also *aedilis*]. Each praetor could issue a new edict for his year in office, setting out the actions he was prepared to allow, but in practice he took over much of the material from his predecessors. This led to the development of an almost standard body of rules known as the "Edict," containing the numerous praetorian extensions to the civil law [*ius civile* q.v.]. This process survived the transition to empire, but the Emperor Hadrian ordered the consolidation of the Edict early in the second century A.D.; thereafter it does not appear to have been a source of new law.

Emancipatio (Emancipation). Voluntary release from parental power [*patria potestas* q.v.], conferring independent [*sui iuris* q.v.] status. *See D.*1.7.

Emphyteusis. A real right over the property of another, consisting in a grant of land by the state or local authority on a long lease or in perpetuity for a groundrent. *See D.*6.3.

Exceptio (Defense). A defense, inserted originally in the *formula* [q.v.], which did not deny the prima facie validity of the claim, but adduced some circumstance which nullified it, for example, duress. There was a number of these defenses, each named after the fact they alleged, for example, the defense of fraud. *See D.*4.3.

Exheredatio (Disherison). The exclusion by a testator of his issue or other persons from taking benefit under his will. Many formal and material restrictions were placed upon such exclusion. *See D.*28.2.

Exilium (Exile). This term was often used to mean voluntary exile as well as involuntary banishment. Voluntary exile after, or to escape from, capital condemnation involved loss of citizenship and property as well as being made an outlaw.

Extraneus Heres. See Heres.

Extra Ordinem (Extraordinary). (a) In private law, this refers to the *Cognitio* System [*cognitio* q.v.] (b) In criminal law, it refers to proceedings other than those authorized for the *quaestiones perpetuae* [q.v.]. The criminal jurisdiction of, for example, the urban prefect [*praefectus* q.v.] was thus *extra ordinem. See D.*50.13.

Familia (Family). As well as a family in the modern sense this term sometimes also covers a person's whole household, including freedmen and slaves as well as relations. *See D.*50.16.195.

Fideicommissum. A charge in a will imposed on an heir or legatee to transfer property to someone else. *See D.*30–31.

Fideiussio (Verbal Guarantee). A verbal contract of personal guarantee, usually but not necessarily covering a principal debt contracted by *stipulatio* [q.v.], its form being a variant of that contract. *See D.*46.1.

Filiusfamilias (Son-in-Power). A son subject to the parental power [*patria potestas* q.v.] of the head of the household, the *paterfamilias* [q.v.]. He was subject to various disabilities, especially in the field of property, although his position was improved by the existence of the *peculium* [q.v.]. This subjection only applied in private law; in public law matters a son-in-power was in the same position as the head of the household.

Flagellatio. See Castigatio.

Formula. The Formulary System was a type of civil procedure introduced in the republic and continuing to operate until the third century A.D., though it was increasingly superseded and eventually replaced by the *Cognitio* [q.v.] System. However, many traces of it can still be found in the *Digest.* The procedure was controlled by the *praetor* [q.v.] who was required by the parties to frame a formal statement of the legal issues in the case, the *formula.* This was then passed on to a lay judge [*iudex* q.v.] for a hearing on the facts. Details of the various kinds of *formulae* available would be found in the Edict [*edictum* q.v.].

Fustigatio. See Castigatio.

Habitatio (Right of Habitation). The right to occupy a house for life. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Heres (Heir). The person who inherits nearly all the rights and duties of the deceased by testate or intestate succession. There was a number of different kinds of heir. A *heres suus* was someone subject to the deceased's parental power [*patria potestas* q.v.] at the time of death; A *heres suus et necessarius* was such a person who became independent [*sui iuris* q.v.] by the death. This type of heir could not refuse the inheritance, as was also the case with the *heres necessarius*, a slave who was

manumitted [*manumissio* q.v.] for this purpose. An *extraneus heres* was someone not subject to the deceased's parental power at time of death, either being unrelated or, for example, emancipated [*emancipatio* q.v.]. A *heres legitimus* was a person who succeeded in accordance with the civil law [*ius civile* q.v.] rules on intestacy. *See D.*28.5.

Honestiores. See Humiliores.

Humiliores. Persons of low social status, in contrast to the upper classes, the *honestiores.* The main legal difference was that only the former were liable to certain kinds of punishment, for example, crucifixion, torture, and corporal punishment.

Hypotheca. A contract of pledge in which the creditor obtained neither ownership nor possession of the property pledged. *See D.*13.7.

Imperium (Authority). The power of the higher republican magistrates, including the *praetor* [q.v.], and later the emperor to issue orders and enforce them, in particular the right to administer justice and to give military commands.

Impubes. A person under the age of puberty, which was eventually fixed at twelve years of age for girls and fourteen for boys. Such persons lacked full legal capacity, and those who were independent [*sui iuris* q.v.] had to be in tutelage [*tutela* q.v.] *See D.*26.

Incola. A person domiciled in a city or community other than the one in which he was born. *See D.*50.1.

Infamia. A condition of disgrace resulting from certain types of immoral or wrongful conduct. It followed, for instance, on conviction for a crime, or condemnation in delictal actions and those involving breach of trust called *actiones famosae.* Many legal disabilities resulted from this condition. *See D.*3.2.

Infans. A child under the age at which rational speech was possible, later fixed at seven years old. Such persons were a type of *impubes* [q.v.] with few legal powers.

Inscriptio. See Accusatio.

Institor. See Procurator.

Interdictum (Interdict). An order issued originally by the *praetor* [q.v.] or other magistrate in an administrative capacity, giving rise to further proceedings if disregarded. Many interdicts in private law were concerned with the protection of possession against unlawful interference in various circumstances. At times, interdicts were a procedural device for awarding interim possession, the party who acquired this becoming the defendant in a subsequent action. But they were also for many other private law and also public law purposes, for example, the interdict from fire and water was a form of banishment pronounced on a voluntary exile [*exilium* q.v.]. The complicated procedure required under the Formulary System [*formula* q.v.] for the use of interdicts became obsolete under the *Cognitio* [q.v.] System, and they were replaced by ordinary actions, although the issues and much of the terminology of the older system remained. *See D.*43.

Iudex (Judge). In the private law Formulary System [*formula* q.v.], the judge was a private individual chosen by the parties to decide the case on its facts, the legal issues having already been defined by the *praetor* [q.v.]. Under the later *Cognitio* [q.v.] System and in public and criminal matters, the term was used of any imperial official with jurisdiction, for example, a provincial governor [*praeses* q.v.]. *See D.*2.1.

Ius Civile (Civil Law). The original basic rules, principles, and institutions of Roman law, deriving from the various kinds of statute [*lex, senatus consultum, constitutio*

qq.v.] and from juristic interpretation. They were applicable directly only to Roman citizens, but in 212 A.D. the *constitutio Antoniniana* conferred citizenship on most of the inhabitants of the empire. The expression is sometimes used in a more philosophical sense to mean the law peculiar to any community or people, whatever its source. Cf. *ius gentium* and *ius honorarium*. *See D.*1.1.

Ius Gentium. The original meaning of this term was probably the body of rules, principles, and institutions developed in the late republic to cover commercial dealings with peregrines [*peregrinus* q.v.] and other noncitizens, who could not use the civil law [*ius civile* q.v.]. Its development may be connected with the peregrine praetor [*praetor* q.v.]. Less formalistic and more sophisticated than the civil law, it came to have a more philosophical sense of the law which was common to all peoples and communities, although its detailed provisions were Roman in character and treated as ordinary rules of law. Cf. *ius civile*. *See D.*1.1.

Ius Honorarium (Praetorian Law). The law introduced by magistrates, especially the praetor [*praetor* q.v.] by means of his Edict [*edictum* q.v.], to aid, supplement, or correct the existing civil law [*ius civile* q.v.]. It provided a large number of remedies which were often preferable to the civil law ones, for example, in the field of succession. *See bonorum possessio*. In juristic writings it was commonly treated as distinct from the civil law, although both were simply parts of Roman law as a whole. Cf. *ius civile*.

Iusiurandum (Oath). Oaths were used in a number of contexts. (a) In general, a party could choose to swear an evidential oath before a judge [*iudex* q.v.]. But certain oaths were compulsory, for example, as to the value of the property claimed and that *calumnia* [q.v.] was absent. *See D.*12.2, 3. (b) In certain actions, the parties could challenge each other to swear oaths as to the validity of their cases. If the challenge was refused, the person refusing lost his case, bringing the trial to a speedy conclusion. This type of oath was called "necessary." *See D.*12.2. (c) In any action, a party could offer to swear or challenge the other party to swear to the validity of his case. The challenge need not be accepted, but if it was, an action or defense of oath was allowed in any subsequent proceedings. Here the oath was called "voluntary." *See D.*12.2. (d) An oath was required of a slave about to be manumitted [*manumissio* q.v.] that he would promise to perform certain services for his former master [*patronus* q.v.]. *See D.*38.1.7.

Ius Naturale (Natural Law). A vague expression in Roman law. At times it was merely a synonym for the term *ius gentium* [q.v.]. It often means that the rule or principle in question was thought of as based on everyday experience, referred to as "natural reason" [*naturalis ratio*]. Sometimes it refers to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent. *See D.*1.1.

Legatus (Legate). A term with a number of meanings. (a) An ambassador. Such a person on an imperial mission was called a *legatus Augusti (Caesaris)*. *See D.*50.7. (b) The deputy of a provincial governor [*proconsul* q.v.] with special delegated jurisdiction. *See D.*1.16. (c) A type of provincial governor was called a *legatus Augusti (Caesaris) pro praetore*. *See D.*1.18.1. (d) The commander of a legion.

Legitimus Heres. *See Heres*.

Lenocinium. *See Stuprum*.

Lex. (a) A statute passed by one of the popular assemblies of republican times. It normally took the gentile (middle) name of the proposer or proposers, the subject matter of the legislation sometimes also being indicated in the title, for example, the *Lex Cornelia* on Guarantors, the *Lex Fufia Caninia*. In the early empire some leg-

islation was passed in this way, but the practice was obsolete by the end of the first century A.D. Thereafter, *lex* is often used of any piece of imperial legislation. *See* *D.*1.3,4. (b) The term also occurs in connection with the *Twelve Tables* [*lex duodecim tabularum*], a collection of early rules traditionally dating from c. 450 B.C., and drawn up by ten commissioners, the *decemviri.* It is not extant, but there are many references to its supposed provisions in the *Digest* and other legal and literary sources. *See* *D.*1.2.4.–6. (c) A special clause in a contract, for example, the *lex commissoria,* which allowed a seller to call off the sale if the price was not paid by a certain time. *See* *D.*18.3.

Libertinus, Libertus (Freedman). A former slave who, on manumission [*manumissio* q.v.], became a freeman and a Roman citizen, though with extensive public law disabilities. He had many duties toward his former master, his patron [*patronus* q.v.]. An imperial freedman [*libertus Caesaris*] manumitted by the emperor, often obtained high governmental office in the early empire. *See* *D.*38.1–5.

Lictor (Lictor). An attendant of a higher magistrate with *imperium* [q.v.], whose main duty was to escort him during public appearances.

Maiestas. This term was applied to a number of criminal offenses including treason, sedition, and desertion. In the empire it covered any action which endangered the emperor or his family. The earlier crime of betrayal to an enemy, *perduellio,* was eventually held to be merely a way of committing this offense. *See* *D.*48.4.

Manumissio (Manumission). The release of a slave by his master during the latter's lifetime or in his will. *See* *D.*40.1–9.

Metallum (Mine). Condemnation to work in a mine was a capital punishment [*capitalis* q.v.] only slightly less serious than the death penalty. There was a milder form known as *opus metalli. See* *D.*48.19.

Minor. A person over the age of puberty [*impubes* q.v.] but under the age of twenty-five. Such persons who were independent [*sui iuris* q.v.] had in classical times full legal capacity, though they could be protected by a grant of *restitutio in integrum* [q.v.]. In later law, the development of the institution of *cura* [q.v.] gave them more protection but some disabilities. *See* *D.*4.4; *D.*26.7,8.

Missio in Possessionem. A remedy granted originally by the *praetor* [q.v.] allowing a person to take over in whole or in part the property of another with various legal results. It had many uses, for example, to protect a creditor's interest after judgment or where property was threatened by the ruinous state of that of a neighbor. *See* *D.*42.4; *D.*39.2.

Munera. Certain public services which every person was bound to perform on behalf of his community or state. Some services were personal, for example, tutelage [*tutela* q.v.], others were burdens on property. Certain taxes were included under this term, and money payments could often be made in lieu of actual labor, for example, in maintaining public roads. The grounds for exemption [*excusatio*] from most of these services were limited. *See* *D.*50.4.

Naturalis Ratio. See Ius Naturale.

Negotiorum Gestio (Unauthorized Administration). The performance of some service on behalf of another person, without his request or authorization. If the action was reasonable in the circumstances, there was an action for compensation. *See* *D.*3.5.

Novatio (Novation). The extinction of one or more obligations by replacing it or them with a new obligation in the form of a stipulation [*stipulatio* q.v.]. *See* *D.*46.2.

Noxae Dare (To Surrender Noxally). To hand over a slave or animal as compensation to the victim of a delict committed by him. This alternative was open to an owner only where there had been no complicity on his part in the delict. *See D.*9.1,4.

Obsequium. See Patronus.

Occupatio (Occupation). The acquisition of ownership by taking possession of a thing not previously owned, such as a wild animal, or a thing which has been abandoned by its owner. *See D.*41.1.

Opus Metalli. See Metallum.

Opus Publicum. Forced labor on public works. This criminal punishment could only be imposed on *humiliores* [q.v.]. Condemnation for life meant loss of citizenship, but lesser terms did not affect status. *See D.*48.19.

Oratio (Oration). A proposal put forward by the emperor for legislation by means of a *senatus consultum* [q.v.]. The approval of the senate became a mere formality, so that the term came to mean a piece of direct imperial legislation, a type of *constitutio* [q.v.].

Pactum (Pact). Any agreement which did not come within one of the recognized categories of contract. Such an agreement was not generally actionable, but was accepted as a defense [*exceptio* q.v.]. However, pacts added to a recognized contract in order to modify its normal obligations were enforceable, as were certain pacts unconnected with any contract, for example, *constitutum debiti* [q.v.]. *See D.*2.14.

Paterfamilias (Head of the Household). The oldest ascendant male agnate [*agnatus* q.v.] in any family was its legal head. He exercised considerable powers over his sons, daughters, and other descendants, that is, those dependent [*alieni iuris* q.v.] on him. They were subject to his control in many matters relating to their persons, for example, marriage, and were incapable of owning property. Apart from certain kinds of *peculium* [q.v.] and some special categories of property in later law, all they acquired passed to their *paterfamilias*. The powers of a *paterfamilias* did not cease when the person subject to them reached majority. Often the word "father" [*pater*] is used in this sense.

Patria Potestas (Parental Power). The power of a *paterfamilias* [q.v.] over those dependent [*alieni iuris* q.v.] on him. In private law, the expression "in power" [*in potestate*] refers either to someone subject to this or the power of master over his slave. *See D.*1.7.

Patronus (Patron). The former master of a slave, who after manumission [*manumissio* q.v.] has become his freedman [*libertus* q.v.]. A patron had many rights over his freedman, particularly with regard to the performance of certain agreed services [*opera*] and in connection with succession. A freedman had to show respect [*obsequium*] to his patron and could not bring criminal proceedings against him or actions involving *infamia* [q.v.]. *See D.*37.14,15; *D.*38.1–4.

Pauperies. Damage done by an animal, without fault on the part of its owner. An action was given for the value of the damage done with the alternative of noxal surrender [*noxae dare* q.v.]. *See D.*9.1.

Peculatus. The misappropriation of public money or property by theft, embezzlement, or any other means. *See D.*48.13.

Peculium. The sum of money or property granted by the head of the household [*paterfamilias* q.v.] to a slave or son-in-power [*filiusfamilias* q.v.] for his own use. Although considered for some purposes as a separate unit, and so allowing a business run by slaves to be used almost as a limited company, it remained technically the

property of the head of the household. From the early empire onward, special kinds of *peculium* came into existence, the "military" [*castrense*] and the "quasi-military" [*quasi castrense*] *peculium*, which were considered for many legal purposes to be the property of a son-in-power himself. *See D.*15.1; *D.*49.17.

Perduellio. See Maiestas.

Peregrinus (Peregrine). In classical times this term usually meant a member of a non-Roman community within the empire, who was subject to the law of his own state and had few of the public or private law rights of a Roman citizen, for example, *conubium* [q.v.]. A special *praetor* [q.v.] dealt with peregrines' transactions. After the *constitutio Antoniniana* [*see ius civile*], the expression came to be applied to foreigners living outside of the empire.

Pignus. A contract of pledge under which the creditor obtained possession of the property pledged, but ownership remained with the debtor. The expression was sometimes used as a general one for any form of real security, including *pignus* and *hypotheca* [q.v.]. *See D.*13.7.

Pollicitatio (Unilateral Promise). A promise made to city or community to make a gift of money or to erect a public building or monument. Such a promise was legally binding in most cases as a matter of public law. *See D.*50.12.

Postliminium. The regaining of most of a person's private and public law rights on returning from capture by the enemy. The main exception in classical law was that a marriage usually did not automatically revive. *See D.*49.15.

Potestas. See Patria Potestas.

Praefectus (Prefect). The title of various kinds of high officials and military commanders in the empire. The most important of these were the praetorian prefects [*praefecti praetorio*], the chief military and civil advisors of the emperor and governors of the four great prefectures into which the later empire was divided. They also had extensive private law and (from the the third century A.D.) criminal law jurisdiction, the courts over which they presided being the highest in the empire. But the two urban prefects [*praefecti urbi*], one at Rome and later one at Constantinople, exercised independent criminal and civil jursidiction over their respective territories. Many of the lesser prefects in charge, for example, of the corn supply [*praefectus annonae*] or the city guard [*praefectus vigilum*], served under the urban prefect and their legal decisions could be appealed to him. The prefect of Egypt [*praefectus Augustalis* or *Aegypti*] was in a special position in a number of ways. *See D.*1.11,12,15,17.

Praelegare. To make a legacy of a specific thing to an heir [*heres* q.v.] in addition to his share of the inheritance.

Praeses (Governor). The general name for any provincial governor, who had judicial as well as administrative powers. *See D.*1.18.

Praetor (Praetor). In the republic, an important magistrate second only to the *consules* [q.v.], in charge of the administration of private law. As well as the urban praetor [*praetor urbanus*], probably the most important, there was also a peregrine praetor [*praetor peregrinus*] dealing with foreigners [*peregrinus* q.v.] and later there were a number of other judicial praetors dealing with specific issues [for example, *fideicommissum* q.v.]. However, because of the growth of a standard body of praetorian law [*ius honorarium* q.v.] leading to the consolidation of the Edict [*edictum* q.v.], these officials are referred to collectively in the texts as "the praetor." The praetor greatly extended and modified the civil law [*ius civile* q.v.] by means of his control over the Formulary System [*formula* q.v.] of civil litigation. Praetors continued to be appointed during the empire, but gradually their legal

functions were taken over by other officials such as the various kinds of prefect [*praefectus* q.v.] and the office became largely honorary. *See D.*1.2.27–34; *D.*1.14.

Praevaricatio. Collusion between the accuser [*accusatio* q.v.] and accused in a criminal trial to secure acquittal, or between a lawyer and his client's enemy. *See D.*47.15.

Precarium. A grant of the possession and general use of property made gratuitously and revocable at any time. *See D.*43.26.

Proconsul (Proconsul). A kind of provincial governor with civil and criminal jurisdiction. *See D.*1.16.

Procurator (Procurator). This term has a number of meanings. (a) The representative of a party in a civil trial. (b) A general manager of another person's business or other affairs. This position was often given to a freedman [*libertinus* q.v.] or a slave. Occasionally, the term was applied to an agent for a single transaction. An earlier type of business manager [*institor*] came to be considered a kind of procurator. *See D.*3.3; *D.*14.3. (c) Many imperial officials were called procurators, for example, a *procurator Caesaris*, originally a fiscal agent but later given many administrative duties. *See D.*1.19.

Quaestiones Perpetuae. Permanent criminal courts, each dealing with one class of offense, the penalty for it being fixed by the relevant statute [*lex* q.v.], which also usually set up the court itself. They had large juries, from whose verdict there was no appeal. The *Cognitio* [q.v.] System was sometimes an alternative. *See D.*48.18.

Quaestor (Quaestor). A magistrate whose office was created in the republic, whose duties were mainly connected with public finances and provincial administration. Their importance declined during the empire. *See D.*1.13.

Rei Vindicatio. See Vindicatio.

Relegatio (Relegation). A form of banishment either for a fixed period or in perpetuity. It did not necessarily involve loss of citizenship or confiscation of property, but merely exclusion from a specified territory. *See D.*48.22.

Repetundae. Extortion or unlawful acquisition of money or property by a person in an official position, such as a provincial governor. *See D.*48.11.

Rescriptum (Rescript). A written answer, issued by the imperial civil service on behalf of the emperor, to legal and administrative questions. These were sent in by officials and private individuals. In principle, such decisions were only binding in the case at issue, but they often came to be considered as of general application.

Restitutio in Integrum. A remedy granted originally by the *praetor* [q.v.] annulling the normal civil law [*ius civile* q.v.] effect of some event or transaction which had unfairly prejudiced a person's position. It had many uses as a remedy against fraud, or even, in the case of a *minor* [q.v.], a bad bargain in certain circumstances. *See D.*4.1,2,3,6.

Senator (Senator). A member of the senate [*senatus*], the most important assembly of the republic, with enormous and undefined advisory, deliberative, judicial, and later legislative powers [*senatus consultum* q.v.]. It was largely composed of ex-magistrates. During the empire the political importance of the senate declined, but senators and their families were considered to belong to the privileged senatorian class [*ordo senatorius*]. But certain legal disabilities were also involved, for example, marriage with a freedman [*libertus* q.v.] or woman was prohibited. *See D.*1.9.

Senatus Consultum. A decision of the senate [*senator* q.v.], which during the republic technically took the form of advice to a high magistrate, for example, the

praetor [q.v.], who would then normally incorporate it in a statute [*lex* q.v.] or the Edict [*edictum* q.v.]. In the early empire, these decisions came themselves to have legislative force. But the increasing role of the emperor in the proceedings [*oratio* q.v.] and the rise of other forms of imperial legislation [*constitutio* q.v.] gradually made the process and its name obsolete. *See D.*1.3.

Servitus (Servitude). A right exercised over property belonging to another. When attached to land or a building for the benefit of whoever owned it, for example, a person's right of way across land adjacent to his own, it was called a praedial [*praediorum*] servitude. Where the right was for the benefit of a particular person, for example, *usufructus* [q.v.], it was called a personal [*personarum*] servitude in later law. The holder of the servitude had an *actio in rem* [q.v.] to assert his rights, called an *actio confessoria.* A person denying that a servitude existed over his property had an action called an *actio negatoria* or *negativa* for this purpose. *See D.*7, *D.*8.

Servus Poenae. A person condemned to slavery as a punishment for a crime, including someone awaiting the death penalty. He was not considered to have a master, and could never be manumitted [*manumissio* q.v.].

Solidus or *Aureus* (Gold Piece). The standard gold coin of the later empire, used in the *Digest* to express any actual sum of money mentioned in the texts.

Statuliber. A slave whose manumission [*manumissio* q.v.] under a will was subject to some condition not yet fulfilled. *See D.*40.7.

Stipulatio (Stipulation). A unilateral verbal contract, concluded, in its original form, by a formal question put by the creditor to the debtor and his answer to it, for example, "Do you solemnly promise that one hundred gold pieces will be given to me?" "I solemnly promise." Any kind of obligation could be expressed in this form, and existing obligations could be reduced to it by novation [*novatio* q.v.], making it perhaps the most common type of Roman contract. No witnesses were required, but it became the usual practice to record the stipulation in writing [*cautio* q.v.]. This was never legally necessary, and the question of whether the *cautio* was considered probative in later law is disputed. The appropriate action on a stipulation was usually a *condictio* [q.v.], although for some purposes there was an *actio ex stipulatu. See D.*45.1.

Stuprum. This term covered a range of sexual offenses from illicit intercourse with a respectable unmarried woman or widow to homosexual rape.

Substitutio (Substitution). The appointment of another heir [*heres* q.v.] or heirs to cover the possibility that the one first instituted might not or could not accept the inheritance, which would make the will void. *See D.*28.6.

Sui Iuris (Independent). Free from the parental power [*patria potestas* q.v.] of another. Where such a person was an *impubes* [q.v.], he would be subject to tutelage [*tutela* q.v.]. In later law, if a *minor* [q.v.], he would be in care [*cura* q.v.].

Superficies. The right to the surface of land belonging to another, originally only a public body, for building or other purposes in return for a rent. *See D.*43.18.

Supplicium Ultimum. An aggravated form of the death penalty, for example, by crucifixion or being thrown to wild beasts. *See D.*48.19.

Suus et Necessarius Heres. See Heres.

Suus Heres. See Heres.

Tergiversatio. See Accusatio.

Testamenti Factio. The right to make, take under, or witness a Roman will. *See D.*28.1.

Transactio. The compromise of legal proceedings, actual or contemplated, in return for payment or other consideration. *See D.*2.15.

Tutela (Tutelage). A form of guardianship over the person and property of an *impubes* [q.v.] exercised by a tutor appointed in various ways. The powers of the tutor varied according to the age of the child, being greater when he was an *infans* [q.v.]. The tutor was accountable at the end of his period in office, that is, when his ward reached puberty. It was considered a public duty [*munera* q.v.], though many exemptions from it were recognized. *See D.*26, *D.*27.

Tutor. See Tutela.

Twelve Tables. See Lex.

Usucapio (Usucapion). The acquisition of ownership by possession of property for a specified period of time and under certain conditions, for example, that the possession was in good faith. *See D.*41.3.

Usufructus (Usufruct). The right to use the property of another and take its fruits or profits [*fructus*] without diminishing its capital value. It was a personal servitude [*servitus* q.v.]. *See D.*7.1–6,9.

Usus (Right of Use). The right to use the property of another without taking its fruits or profits. It was a personal servitude [*servitus* q.v.]. *See D.*7.8.

Verberatio. See Castigatio.

Vicarius. (a) In private law, a substitute for another person or an underslave, a slave who is part of the *peculium* [q.v.] of another slave. (b) In public law, many kinds of deputy were given this name, as well as certain provincial governors of the late empire.

Vindicatio. A term commonly used for the action claiming ownership of property, its full title being *rei vindicatio.* It was sometimes also used to cover other kinds of mainly real actions [*actio in rem* q.v.]. *See D.*6.1.

Vis (Force). This expression has two different meanings: (a) In private law, it covered any action which might provoke fear [*metus*] in another, whether involving actual violence or not. Many of the interdicts [*interdictum* q.v.] of the *praetor* [q.v.] dealt with this matter. (b) In criminal law, it meant various kinds of violent assault and public disturbance, although it was also applied to certain offenses committed by officials. *See D.*4.2., *D.*43.16.

BOOK SIXTEEN

1

THE *SENATUS CONSULTUM VELLEIANUM*

1 PAUL, *Edict, book 30:* It has been very fully prescribed by the *senatus consultum Velleianum* that women should not intercede on behalf of any person. 1. For just as by custom the undertaking of civil duties by them has been denied to women, and these [undertakings] for the most part are not valid by operation of law, so much the more had that power to be taken away from them in which not only their work and mere employment was concerned but even the risk of the family property. 2. And, indeed, it seems just to give assistance to a woman in this way, in order that the action is given against the original debtor or against him who rendered the woman liable on his own behalf; for he, more than the creditor, has overreached the woman.

2 ULPIAN, *Edict, book 29:* Now, first in the reign of the deified Augustus, and then soon afterward in that of Claudius, it was forbidden by imperial edict for women to intercede on behalf of their husbands. 1. Thereafter a *senatus consultum* was enacted by which help was given in a very full manner to all women; the wording of the *senatus consultum* follows: "Because Marcus Silanus and Velleus Tutor, the consuls, had written what ought to be done concerning the obligations of women who became debtors on behalf of others, the senate lays down the following: Although the law seems to have said before what pertains to the giving of verbal guarantees and loans of money on behalf of others for whom women have interceded, which is that neither a claim by these persons nor an action against the women should be given, since it is not fair that they perform male duties and are bound by obligations of this kind, the senate considers that they before whom the claim would be brought on this matter would act rightly and consistently if they took care that with regard to this matter the will of the senate was observed." 2. And so let us examine the terms of the *senatus consultum*, having first praised the foresight of the most distinguished order [the senate], because it brought help to women, seduced and deceived in many cases of this kind, on account of the weakness of their sex. 3. But relief is only granted to them if they have not been guilty of deceit; for this the deified Pius and Severus have laid down by rescript. This is because relief is given to those who have been deceived, not to those who deceive. This has also been stated in a Greek rescript of Severus in the following terms: "The decree of the senate does not give assistance to women who are guilty of deception"; for it was the vulnerability of women, not their cunning that deserved assistance. 4. Every single kind of obligation is embraced by the *senatus consultum Velleianum*, whether the women interceded by verbal, by real, or by any other sort of contract whatsoever. 5. But even if a woman acts as someone's *defensor*, there is no

doubt that she intercedes; for she takes upon herself the obligation of another, inasmuch as, on account of this action, she suffers the condemnation. Accordingly, a woman is not allowed to act in defense either of her husband, her son, or her father.

3 PAUL, *Edict, book 30:* But if she undertakes the defense of someone who, were he condemned, would have recourse against her; for instance, where she defends the seller of an inheritance which has been sold to herself or where she defends her own verbal guarantor, she is not seen to intercede.

4 ULPIAN, *Edict, book 29:* But if I have contracted with a woman from the very beginning, when I did not know on whose behalf this act was intended, I do not doubt that the *senatus consultum* does not apply; and so the deified Pius and our own emperor have stated by rescript. 1. Therefore, if, while wishing to make a present to Titius, she accepted from me a loan of money and gave it to Titius, the *senatus consultum* will not apply. But even if, intending to make a present to you, she pays the money to your creditor, she does not intercede; for the senate wished to give assistance to the woman who had been placed under an obligation, not to a woman who makes gifts. The reason for this is that it is easier for a woman to place herself under an obligation than to make somebody a gift.

5 GAIUS, *Provincial Edict, book 9:* It does not matter whether she pays money to discharge a debt or whether she gives however much of her property as payment; for certainly, if she sells her property, whether she paid the price she received on behalf of the other person or whether she directed the buyer to pay the other person's creditor, I do not think that there is cause for the *senatus consultum.*

6 ULPIAN, *Edict, book 29:* If verbal guarantors have interceded by mandate of the mother on behalf of the *defensor* of an absent son, it is asked whether the *senatus consultum* is available even to these persons. And Papinian says in the ninth book of his *Questions* that they could make use of the defense. And it does not make much difference that they gave verbal guarantee on behalf of the *defensor* since they intervened as a consequence of the mandate of the mother. To be sure, he says, if he who accepted the said verbal guarantors was unaware that the mother had given them a mandate, the defense of the *senatus consultum* should be met with a counter defense of fraud.

7 PAPINIAN, *Questions, book 9:* Therefore, although, when the counterdefense of fraud has been lodged, the verbal guarantor loses the defense provided by the *senatus consultum,* he nevertheless will have no counter defense against the woman because he cannot allege ignorance of the facts as an excuse. But it will not be unjust for the action for unauthorized administration to be given against the *defensor* because the mandate is rendered void by the *senatus consultum* and he is released by the payment of the verbal guarantor.

8 ULPIAN, *Edict, book 29:* Although the giving of a pledge constitutes an intercession, nevertheless Julian, in the twelfth book of his *Digest,* writes that the return of a pledge does not constitute an intercession if a woman, who is the creditor, releases to the debtor the property which she has received on pledge. 1. If a woman appears before the tutors of her son to prevent them from selling his estates and promises to indemnify them in return, Papinian, in the ninth book of his *Questions,* does not think that she has interceded; for she has taken on no obligation, whether old or new, of another, but she herself has contracted this obligation. 2. If a woman becomes surety for Secundus with Primus and soon thereafter for Primus with his creditor, Julian writes in the twelfth book of his *Digest* that two intercessions have been made, one for Secundus with Primus, the other for Primus with his creditor, and therefore an obligation is contracted both to Primus and against him. Marcellus, however, notes that it makes some difference whether, in this case, the woman is substituted in the place of the other from the very beginning and undertakes the burden of the debtor from

whom the creditor wanted to transfer the obligation or whether indeed she is given as if as a substitute debtor; for certainly if she has been given as if as a substitute, there must only be one intercession. Therefore, following this distinction of his, in the first case where she has been given as if as a substitute debtor, Marcellus did not give the defense of the *senatus consultum* to her. But after having been condemned, or indeed before condemnation, she will certainly be able to bring a *condictio* against him by whom she was given as a substitute debtor, either for what she has lost or, if she has not yet lost anything, for release. 3. Sometimes the *condictio* is also available to the woman who intercedes, for example, where, having bound herself contrary to the *senatus consultum*, she gives her own debtor as a substitute debtor; for certainly, the *condictio* is available to her here, just as if, where she had paid the money, she brought the *condictio*; for she pays also who provides a substitute debtor. 4. But if he who has been given as a substitute debtor by the woman was not her debtor, he will be able to avail himself of the defense of the *senatus consultum* just as if he were the woman's verbal guarantor. 5. Clearly, if a woman who is about to intercede gives her own debtor as a substitute, the *senatus consultum* is inapplicable, because even if she had paid money the *senatus consultum* would not apply. For by means of the *senatus consultum* a woman is afforded relief, she who has lost something is not given restitution. 6. However, if she gives as a substitute debtor one who was not her debtor, fraud will be seen by the *senatus consultum* to have been committed, and, therefore, the defense is given. 7. Whenever a woman intercedes on behalf of a debtor, the original action is given against him, even if he has been discharged by formal relief before the woman intercedes. 8. If [a creditor] agrees with his debtor that he provide someone to assume his debt and a formal release is granted to the debtor, then he provides a woman who was protected under the provisions of the *senatus consultum*, a *condictio* can be brought against him as if he had not provided [a substitute debtor]; for what is the difference between not providing one and providing one of such a kind? Therefore, the *actio utilis* will not be necessary since the *condictio* is available. 9. Marcellus also writes that if a creditor discharges a woman by formal release after she has interceded, no less ought the action for restitution to be granted to him; for he has released a void obligation. 10. If a woman, after having interceded, pays in such a way that she is unable to recover [her money], rightly the former debtor resists the action. But since the debtor is released if the woman pays in such a manner that she is unable to recover, likewise the debtor is released if the creditor discharged by formal release the woman who could not recover, were she to have paid. 11. Although an action is restored against all who have been released, it is not, however, restored in favor of all. For example, there were two parties who [jointly] entered into a stipulation; a woman interceded on behalf of one of them. The obligation is restored only in favor of him on whose behalf she interceded. 12. If a creditor becomes heir to a woman, it must be considered whether he cannot make use of the action for restitution. And Julian says in his twelfth book that no less will he be entitled to the action for restitution, not undeservedly, since he succeeded to a woman under no effective obligation. Therefore, this debt will not be brought into the reckoning in the administration of the *lex Falcidia*. 13. Clearly, if you put the case to me of a woman who has succeeded to a former debtor, it must be said that she can be sued with the action for restitution and also with the direct action; for it makes no difference to her by which action she is sued. 14. If, when I was about to contract with you, a woman intervened and I rather contract with her, she is seen to have interceded in which case an action is given against you which institutes rather than restores an obligation, so that you are bound by the same kind of obligation as that by which the woman is bound; for example, if the woman would have been liable under a stipulation, you also will be sued as if on a stipulation. 15. The question must be considered whether, if a woman intervened on behalf of him who would not have been bound had the contract been made with him directly, he ought to be liable to this action, for instance, if she intervened on behalf of a pupil who is not bound without the authority of his tutor, and I think that the pupil is not liable unless he has been enriched by this contract. Likewise, if he on behalf of whom the woman interceded is under twenty-five years of age, he will be able to apply for *restitutio in integrum*, or if he is a son-in-power who had intended to

contract contrary to the *senatus consultum* [*Macedonianum*].

9 PAUL, *Rules, book 6:* But if she intercedes on behalf of another's slave, just as the action is restored against the head of the household who is the former debtor, likewise it will also have to be restored against the master.

10 ULPIAN, *Edict, book 29:* These actions which are given against those on behalf of whom the woman interceded lie both to the heirs and against the heirs and are perpetual for they are reipersecutory. They will also be given to the remaining praetorian successors and against them.

11 PAUL, *Edict, book 30:* If a woman receives money for her own use, but with the intention of lending it to another, there is no place for the *senatus consultum*; for otherwise no person will contract with women because he cannot know what they might do.

12 PAUL, *Breviary, book 6:* On the other hand, there is occasion for the *senatus consultum* in the circumstances where the creditor knows that she is interceding.

13 GAIUS, *Provincial Edict, book 9:* Sometimes a woman may undertake the obligation of another and not be given assistance under this *senatus consultum*; this is the case where she assumes an obligation which at first sight appears indeed to be that of another, but is in truth her own, as, for example, where a female slave, in view of a pact of liberty, having provided a promisor, undertakes after manumission precisely that which the promisor owes, or where she buys an inheritance and transfers to herself the debts of the inheritance, or where she intercedes on behalf of her own verbal guarantor. 1. With regard to the pledges of a former debtor, it is not necessary for the creditor to have a new action, since the *quasi-Serviana* (which is also called *hypothecaria*) is available to cover these, because it is true that an agreement has been made concerning the pledges and that the money has not been paid. 2. If a woman intercedes on behalf of another under a condition or with reference to a particular time, even while the condition is pending, an action for restitution must be given to the creditor who wants to proceed against the former debtor; for where is the advantage in waiting for the fulfillment of the condition or expiration of the time since this former debtor is in such a position that in all events it is he who must suffer the action?

14 JULIAN, *Digest, book 12:* If a woman intercedes contrary to the *senatus consultum*, it is right that the action be restored not only against the former debtor, but also against his verbal guarantors; for when the liability of the woman to the creditor is removed on account of the *senatus consultum*, the original position must be restored unimpaired.

15 JULIAN, *Digest, book 51:* If I pay to a woman what I owe to you and I receive a stipulation from her that you will ratify the matter and, by chance, you not having ratified, I institute proceedings on the stipulation, the defense of the *senatus consultum* which has been enacted concerning the intercessions of women will not be of benefit to the woman; for she cannot be seen to be unwilling to carry out the obligation of another, since I remain liable for the debt; and she herself has gain in mind and is compelled to hand over what she had received as being something not owing, rather than to pay on behalf of another.

16 JULIAN, *Urseius Ferox, book 4:* If a woman interceded on my behalf with Titius contrary to the *senatus consultum Velleianum* and I have actually paid the woman and Titius were to claim that money from her, the defense of this *senatus consultum* would not be of benefit to the woman; for she is not in danger of losing that money since she already has it in her possession. 1. If I accepted a verbal guarantee on behalf of a woman who interceded contrary to the *senatus consultum*, Gaius Cassius

replied that the defense is only to be given to the verbal guarantor in the circumstances where he had been asked by the woman to act on her behalf. But Julian rightly thinks that the defense is to be given to the verbal guarantor even if he does not have the action on mandate against the woman because the senate disapproves the whole obligation and the former debtor is restored to the creditor by the praetor.

17 AFRICANUS, *Questions, book 4:* A husband, wishing to make a present to his wife, had sold property at a lower price and had committed her to his own creditor for that price. It was replied that the sale was of no effect and that if the creditor claimed the money from the woman, the defense would be available, although the creditor thought that the woman was a debtor to her husband. Nor ought this to be seen as contrary to the established principle that if at any time the woman borrowed money with the intention of lending it to her husband, the defense would not stand against [the creditor] if he did not know for what purpose the woman was borrowing, since it makes a very great deal of difference indeed whether he contracts with the woman in the first place or whether he transfers the obligation of another to her; for then he ought to be more diligent. 1. If a woman said that property had been pledged to her on account of her dowry and a creditor, who received the same pledge, provided that the money of the dowry be paid to her, and in addition money on loan was owed to the woman, if, when she brought the *Serviana*, the possessor creditor used against her the defense "unless the pledge had been given with her consent," the counterdefense of the *senatus consultum* would not benefit the woman unless the creditor had known that the other money in addition was owed to her. 2. A woman and Titius, when they borrowed money for a common enterprise, were made debtors for the same money. It was stated that not in all cases is the woman seen to have interceded with respect to the share of her partner; for if they borrow money for a purpose, on account of which, if the creditor had not given the money, the woman would have suffered more loss, for example, where a common building would not have been supported or where a common piece of land would [otherwise] have been committed to the public treasury, it is preferable that there be no application of the *senatus consultum*. But if the borrowed money was obtained for some [other] purchase, in these circumstances an intercession is seen to have been made with respect to the share of the partner, and, therefore, the creditor is able to claim only part of the money from the woman because if he claims the whole amount, he is barred by the defense with respect to the share [of the partner].

18 PAUL, *Plautius, book 8:* The same applies if Titius and the woman intercede as two debtors on behalf of my debtor.

19 AFRICANUS, *Questions, book 4:* The tutor of a *pupillus* had died after having instituted Titius heir. Although he was uncertain concerning the acceptance of the inheritance because the tutelage was thought to have been badly performed, in view of the persuasion of the mother of the *pupillus* to the effect that he would enter at her risk, he entered and took a stipulation from her that on this account he would be indemnified for loss. If in relation to this matter Titius had paid anything to the *pupillus* and had brought an action against the mother, it was said that there was no cause for the defense of the *senatus consultum* since it can scarcely be that any woman can be understood to have interceded with the same [Titius] on behalf of that particular person [*pupillus*]. 1. Not dissimilar to this proposition just considered is the following case of fact. A certain man, who had been praetor, died, leaving two surviving sons of whom one was *impubes* and the other legitimate tutor to his brother. He wished to abstain from the inheritance of his father, [but] on a mandate from the wife of the deceased, who was mother to the *pupillus*, he alone entered upon the inheritance, the *pupillus* having abstained. Julian says that he would have responded in similar fashion here if, for this reason the *pupillus* brought an action and loss was suffered on this account, and that the tutor would not be prevented by the *senatus consultum* from recovering damages from the woman. 2. In this context, it must also be considered

whether, if he who enters on an inheritance by mandate of a woman, on that account suffers loss because the debtors of the estate are insolvent, there is cause for the *senatus consultum*, as if, in a certain way, the woman undertakes these persons' obligations. However, the better opinion is that certainly on this basis there is no cause for the *senatus consultum*, since she was not of a mind to intercede on behalf of these persons but to guarantee the estate of the tutor against the *pupillus* and any possible remaining creditors. 3. Accordingly, if we suppose that the woman suffers loss on account of buying an inheritance because the debtors of the estate are insolvent, I do not think there will be any doubt that there is no cause for the *senatus consultum*, even if she has had to pay the creditors a very great deal more. 4. But what if, when Titius was uncertain about entering on the inheritance because the claims against the debtors seemed to be of doubtful value, the woman promised in return that she herself would be responsible for that much less than could be obtained from each one of them? One is not far from an intercession here. 5. When Titius was your debtor and a woman wanted to intercede on his behalf, you did not accept the security of the woman on account of the *senatus consultum*. The woman asked for a loan of money from me in order to pay it to you, and she promised [the repayment] by stipulation to me who was ignorant of the purpose for which she was borrowing the money; then she directed me to pay [the money] to you. Thereafter, because I did not have any money to hand, I promised it to you by stipulation. It was asked whether, if I claim the money from the woman, the defense of the *senatus consultum* is of use to her. It was replied: We must consider whether it might not indeed be said that I should be deemed to be in the position of one who acts as a verbal guarantor on behalf of the woman; the consequence being that just as the defense against the creditor is given to him, although he did not know that the woman interceded—lest an action on mandate lie against the woman—so the *utilis* defense is also given to me against you and the action against the woman denied to me since this action would put her at risk. And this is to be said the more readily if, before I paid you the money, I discovered that she had interceded. However, on the assumption that I paid beforehand, it must be considered whether the defense ought, nevertheless, to be given to the woman against me, while I could bring a *condictio* against you for the money, or whether in fact the matter must be viewed just as if in the beginning I had lent the money to the woman and you separately had become my creditor. This indeed was thought to be the better opinion, so on this basis there is no cause for the *senatus consultum*, just as where a woman substitutes her own debtor an intercession does not occur. Later it was said that these cases are not rightly compared because, when a substitution of a debtor has been made, the woman is not bound; but in this case she transfers to herself the obligation of another which the senate certainly does not wish to happen.

20 AFRICANUS, *Questions, book 8:* If a woman interceded on behalf of one [of two] debtors, the action is restored to the creditor against both.

21 CALLISTRATUS, *Institutes, book 3:* If a woman intercedes on behalf of somebody but what was received was employed to her benefit, the defense of the *senatus consultum* does not apply because she does not become poorer. 1. Likewise, if she does something out of generosity, for example, [if she intercedes] in order that her father, who has had judgment rendered against him, is not distressed on account of the payment, she will not be secure under the *senatus consultum*; for the senate gives relief to the burdens of women.

22 PAUL, *Rules, book 6:* If I gave money to a woman for her to pay to my creditor or for her to promise to pay the debt in my place, if she so promises, Pomponius writes that there is no cause for the *senatus consultum* because a woman liable to an action on mandate is seen to be bound with reference to her own affairs.

23 PAUL, *The Senatus Consultum Velleianum, sole book:* Suppose that a woman, when questioned before the court, replies that she is heir; if she replies knowing that she is not heir, by no means is she seen to have interceded, because she was guilty of deception. But where she thought she was heir and replies having been deceived on that score, most thought that an action would in fact be given against her, but that she

would have recourse to the defense of the *senatus consultum.*

24 PAUL, *The Intercessions of Women, sole book:* A woman, who was the debtor, when she had been given as a substitute debtor by her creditor, made a promise by stipulation on behalf of him to whom she had been committed. She will not be able to employ the defense. 1. But if she has promised money in order not to be given as a substitute debtor, she is seen to have interceded. 2. If the benefit of the *senatus consultum* is available, does the action lie against the prior debtor immediately the woman intercedes, or if the woman claims back in a *condictio,* what has been paid? I think it lies immediately and that payment should not be waited for. 3. If a woman intercedes on behalf of someone who was liable to an action limited by time, such a temporal action, however, will be restored in such a way as to ensure that the time will be reckoned after the restitution resulting from the previous events, even though he was entitled to it immediately if the woman interceded.

25 MODESTINUS, *Advice on Drafting, sole book:* If a woman orders credit to be given to her slave, she will be liable to the praetorian action. 1. But if she acts as a verbal guarantor on his behalf, having been sued, she will be able to protect herself against the creditor with the defense of the *senatus consultum Velleianum,* unless she so acted for the benefit of her own affairs.

26 ULPIAN, *Edict, book 37:* If a woman, with the intention of interceding, replies that a slave belonging to another is her own, she will be able to make use of the assistance provided by the *senatus consultum,* as if she had interceded. Clearly, if she replies on behalf of him who in good faith is serving her as a slave, she is not considered to have interceded.

27 PAPINIAN, *Replies, book 3:* He who, when contracting, trusted in good faith the person of a woman will not be barred by the defense of the *senatus consultum* on account of those things which, after the receipt of the money, have been applied between husband and wife. 1. When slaves, appointed to do business, while contracting with someone else, accept the person of a woman as a suitable security, she can bar the master with the defense of the *senatus consultum;* nor is the position of the master considered to be made worse by the slave; for nothing has been acquired by the master, any more than if the slave buys an estate which is the subject of litigation or if he buys a freeman. 2. A woman directed her female debtor to pay her husband so that he would pay money to her creditor. If she acts as guarantor to her husband on behalf of her whom she transferred, there will be no cause for the defense of the *senatus consultum* because the woman administered her own affairs.

28 SCAEVOLA, *Replies, book 1:* Seia bought some slaves, received money on loan under the verbal guarantee of her husband, and paid it to the seller. Afterward the husband, when he died insolvent, in order to defraud the creditor, stated in his will that he owed the whole amount of that money. It is asked whether the woman was considered to have interceded. I replied that according to the facts stated she has not interceded. 1. A husband, on account of a lease, pledged to Sempronius a piece of land belonging to his wife. Thereafter, the woman, having received money on loan from Numerius on her own security with the pledge of the same piece of land, immediately paid Sempronius on behalf of her husband. It was asked whether she has been placed under an obligation contrary to the *senatus consultum*? I replied that if Numerius had known she was interceding, there would be cause for the *senatus consultum* in question.

29 PAUL, *Replies, book 16:* A certain man wanted to lend money to the heirs of Lucius Titius and to contract with them; but, because he suspected their solvency, he preferred to lend the money to the wife of the testator and to receive a pledge from her. The woman lent the same money to the heirs and received a pledge from them. I ask whether she may be considered to have interceded and whether the pledges which she received are available to the creditor. Paul replied that if the creditor, when he wanted to contract with the heirs of Lucius Titius, after having rejected these, preferred the woman as debtor, not only is there cause on her part for the *senatus consultum* which has been enacted concerning intercessions but also the pledges given by her are not available to the creditor. However, that property which the woman received on pledge from those on behalf of whom she interceded has not been pledged to her creditor. Yet the praetor will not act without reason if he not only gives an action against the principal debtors, once the claim against the woman has been put to one side, but also against the property which has been pledged to the woman. 1. Paul replied that what can be shown to have been contrived to evade the *senatus consultum* which has been enacted concerning the intercession of women ought not to be approved.

30 PAUL, *Views, book 2:* If a woman intercedes on behalf of someone with the intention of deceiving or when she knew that she could not be held liable, the defense of the *senatus consultum* is not given to her because the very distinguished order [of the senate] does not exclude an action which lies for the fraud of the woman. 1. If a procurator intercedes on behalf of another by mandate of a woman, he is given assistance by the defense of the *senatus consultum Velleianum* lest otherwise the action be lost.

31 PAUL, *Neratius, book 1:* PAUL: if a woman does not want to reclaim what she paid on an intercession, but wants to bring the action on mandate and provide security to the debtor with respect to indemnification, she must be heard.

32 POMPONIUS, *Senatus Consulta, book 1:* If a woman enters on someone's inheritance in order to undertake his debts, one ought hardly to give her assistance, unless this has been conceived of by the fraud of the creditors; for a woman must not be considered in all things as someone less than twenty-five years of age who has been deceived. 1. If a woman wants to recover property which was given by her on pledge as an intercession, she receives back fruits unrestricted, and if the property has been put in a worse condition, on that account she may claim higher damages. But if the creditor who receives the pledge as an intercession sold it to another, their opinion is correct who think that an action for recovery should be given to her even against the buyer in good faith, lest the buyer finds himself in a better position than the seller was. 2. Likewise, if a woman sold and delivered a piece of land to her husband's creditor on the condition that the buyer would place the money to the husband's credit and she brings a *vindicatio* for this land, the defense of property sold and delivered certainly lies against her, but she will be able to raise the counterdefense, "or if this sale has been concluded contrary to the *senatus consultum.*" And this is the position whether the creditor himself makes the purchase or whether he employs another in order that the woman be deprived of her property in this way. Moreover, it is the same if she delivered her property not on behalf of her husband, but on behalf of another debtor. 3. If a woman, to avoid interceding, gave a mandate to a third party to do this for her, will there be cause for this person, who acted by request of the woman, to avail himself of this *senatus consultum*? For the whole content of the *senatus consultum* is concerned with the fact that the claim is not to be given against the woman herself. And I think that the matter is to be distinguished thus, that if indeed the creditor to whom I bound myself by mandate of the woman to evade the *senatus consultum* had planned that in order that the woman herself would not intervene contrary to the *senatus consultum* he would provide someone else instead, he is to be barred by the defense of evasion of the *senatus consultum.* If in truth he was ignorant, but I, on the other hand, had been aware of the facts, under these circumstances I am to be barred when I proceed with the action on

mandate against the woman; however, I am to be liable to the creditor. 4. If a woman is ready to defend an action for him on behalf of whom she interceded in order that the action is not given against the old debtor, because she is able to advance the defense of the *senatus consultum*, she will have to give security that she will not make use of the defense and that thus she will go before the judge. 5. It must be understood that a woman intercedes even on behalf of him who cannot be put under an obligation, for example, where she intercedes on behalf of another's slave. But after the abrogation of the intercession the action is to be restored against the master.

2

SET-OFF

1 MODESTINUS, *Encyclopaedia, book 6:* Set-off is the adjustment of a debt and a claim one with the other.

2 JULIAN, *Digest, book 90:* Anyone bars the claim of his creditor, who at the same time is his debtor, if he is ready to make set-off.

3 POMPONIUS, *Sabinus, book 25:* Therefore, set-off is necessary because it is important for us rather not to pay than to reclaim what has been paid.

4 PAUL, *Sabinus, book 3:* It is true, both what was decided by Neratius and what Pomponius also says, that by operation of law the verbal guarantor owes that much less on every contract that the debtor is able to retain as set-off; for just as when I claim the whole amount from the debtor, I claim improperly, likewise the verbal guarantor is also by operation of law not liable for a greater amount than that for which the debtor can be condemned.

5 GAIUS, *Provincial Edict, book 9:* Should anything be claimed from a verbal guarantor, it is perfectly just for the verbal guarantor to choose whether he prefers to set off what is owed to himself or what is owed to the debtor; but even if he wishes to set off both, he is to be heard.

6 ULPIAN, *Sabinus, book 30:* Even what is due on a natural obligation is the object of set-off.

7 ULPIAN, *Edict, book 28:* Where what is owed is not exigible until a certain date, it will not be the subject of set-off before the arrival of the day, albeit that it must be paid. 1. If a judge takes no account of the set-off, the claim remains good for the defense of property adjudged cannot be advanced. I will say differently if he rejected the set-off as if no debt existed; for then the defense of *res judicata* will prejudice my position.

8 GAIUS, *Provincial Edict, book 9:* Even that can be included as set-off on the account of which issue has been joined with the plaintiff, lest whoever is more diligent finds himself in a worse position if set-off be denied to him.

9 PAUL, *Edict, book 32:* If a partnership has been contracted with a son-in-power or a slave and the master or father brings an action, we include the whole amount as set-off, although, if we were to bring an action, he would be liable only to the extent of the *peculium*. 1. But if an action is brought against a son-in-power, it is asked whether the son is able to set off what was owing to his father? And it is better that this be allowed because a single contract has been concluded; but under the condition that he gives security that his father will approve his act, that is, that he will not exact payment of what the son has set off.

10 ULPIAN, *Edict, book 63:* If we both, as partners, were guilty of equal negligence with respect to the partnership, it must be said that we cease to be liable to one another, set-off for the negligence having been made by operation of law. In like manner, it is approved that if one of us takes something from the common property and the other is guilty of negligence which is assessed at a similar value, set-off and discharge of one to the other are seen to have been made by operation of the law. 1. Accordingly, if someone who is able to make set-off pays, he can bring a *condictio* as if what was not owing has been paid. 2. Whenever an action originates in a wrong, for example, on

account of theft and other wrongs, if, on this account, suit is brought for money, there is a place for set-off. The position is also the same if a *condictio* for theft is brought. But even he who is sued in a noxal action is able to claim set-off. Also in stipulations which are equivalent to actions, that is, in praetorian ones, there is a place for set-off; and, according to Julian, set-off can be claimed in the stipulation itself just as in an action on the stipulation.

11 ULPIAN, *Edict, book 32:* When one party owes the other money without interest and the latter owes money with interest, it has been decided in a *constitutio* by the deified Severus that the interest on the respective sums of both parties is not to be paid.

12 ULPIAN, *Edict, book 64:* It has been decided in a *constitutio* that the law is the same not only in private affairs, but in fact even in matters of the imperial treasury. But even if there is a reciprocal debt of money at interest, however the rates of interest are different, there is nonetheless a place for set-off of that which is owed by one to the other.

13 ULPIAN, *Edict, book 66:* What Labeo says is not without reason, namely, that if a set-off has been fixed specifically for some claim, it is not to be applied against others.

14 JAVOLENUS, *From Cassius, book 15:* Whatever can be defeated by a defense does not come into set-off.

15 JAVOLENUS, *Letters, book 2:* I have stipulated that money be given by Titius at a certain place. He claims from me the money I owe to him. I ask whether how great my interest was that the money be given at a certain place is also to be the subject of set-off? It was replied: If Titius makes a claim, also that money which he promised at a particular place ought to be brought into set-off, but also with its interest, that is, that consideration be given to how great the interest of Titius is that the money be given over at an agreed place.

16 PAPINIAN, *Questions, book 3:* When one of a soldier's heirs inherited the *peculium castrense* and the other, the rest of the property, and a debtor liable to one of the heirs wants to set off what is owed from the other, he will not be heard. 1. When, within the period of time given for the execution of judgment, the person against whom judgment had been given in favor of Titius brings an action against the same Titius, who himself also has previously had judgment given against him to the other party, set-off will be allowed; for it is one thing that the time for the performance of the obligation has not matured, and another that on account of humanity time is allowed for payment.

17 PAPINIAN, *Replies, book 1:* He who was condemned because he supplied a smaller amount of provisions than he should when he was an aedile will not be seen to be a debtor for the money for the corn and therefore will be able to make set-off.

18 PAPINIAN, *Replies, book 3:* A person appointed procurator to his own affairs, after joinder of issue, if sued in turn for what he owes, may justly claim set-off. 1. A creditor is not compelled to set off what he owes to someone other than his own debtor, albeit that his creditor wants to make set-off on behalf of him [first creditor's debtor] who is being sued on account of his particular debt.

19 PAPINIAN, *Replies, book 11:* A debtor paid public money to a public slave without the consent of those to whom the debt could rightly be paid. The obligation will remain undischarged, but he will be allowed to set off to the limit of the public slave's *peculium.*

20 PAPINIAN, *Replies, book 13:* It was not acceptable that a manager, condemned on account of an undertaking for the supply of provisions entrusted at the time of an expedition, retain money by the right of set-off, since this is not subject to set-off.

21 PAUL, *Questions, book 1:* Since it was accepted by all that what is owed reciprocally is set off by operation of law, if a procurator of an absent person is sued, he will not have to give security for ratification because nothing is set off; but from the beginning a lesser sum is claimed from him.

22 SCAEVOLA, *Questions, book 2:* If you owe ten thousand sesterces or a slave, whichever the opponent desires, set-off of this debt is allowed only if the opponent said openly which one he desired.

23 PAUL, *Replies, book 9:* If a tutor claims what is owed to the pupils in their name, there cannot be set-off of the money which that tutor owes to the opponent in his own name.

24 PAUL, *Decrees, book 3:* The emperor ordered that he is to be heard who establishes that what is owed to him by the imperial treasury is the amount for which he is being sued.

3

THE ACTION AND CONTRARY ACTION ON DEPOSIT

1 ULPIAN, *Edict, book 30:* A deposit is what has been given to another for safekeeping. It is so named from the word *ponere*, to place. The preposition *de* makes up the term *depositum* to show that everything which pertains to the safekeeping of the property had been committed to the good faith of the depositee. 1. The praetor says: "Where property has not been deposited on account of tumult, fire, disaster, or shipwreck, I will give an action for simple damages; but for those cases mentioned above, against the depositee himself I will give an action for double damages, against his heir, where he who has died is alleged to have been guilty of fraud, an action for simple damages, and against the heir who is himself guilty of fraud, double damages." 2. The praetor has rightly separated those cases of fortuitous deposit which result from necessity and not from choice. 3. He is understood to deposit on account of tumult, fire, and so forth, who has no other reason for depositing than the imminent danger resulting from the above cases. 4. This distinction in causes is well founded; indeed, when someone has chosen to rely on the trustworthiness of another and the deposit is not returned, he ought to be content with simple damages. However, when he deposits through necessity, the crime of perfidy increases and the public welfare demands retribution for the sake of protecting the common interest; for it is harmful to betray trust in cases of this kind. 5. Those things which are accessory to the deposited object are not deposited. So, for example, if a clothed man is deposited, his garment is not deposited; likewise, in the case of a horse with a halter, only the horse has been deposited. 6. If it is agreed that there is also to be liability for fault with regard to the deposit, the agreement is valid; for the principle underlying contracts is agreement. 7. If it is agreed that there is to be no liability for fraud, you will not approve it; for this agreement is contrary to good faith and good morals and therefore is not to be followed. 8. If clothes given to the keeper of a bath for safekeeping are lost and if the keeper has received no fee for the safekeeping, I think that he is liable in an action on deposit and that he ought to be responsible only for his fraud; but where he has received a fee, he is liable to an action on hire. 9. If anyone compels a slave held for safekeeping to work in a mill, I think that there is an action on hire against him if he received payment for the safekeeping. However, if it was I who received payment for this slave whom he took into the mill, I can bring the action on leasing. But if the work of the slave was payment for the safekeeping, this is as if it were a kind of leasing and hiring but, because money is not paid, an action *praescriptis verbis* is given. Indeed, if

nothing other than food was supplied and nothing was agreed concerning the work, the action is on deposit. 10. In hire and in any transaction which we have said should give rise to the action *praescriptis verbis*, they who received the slave will be liable for both fraud and fault. But if they supplied no more than food, liability is only for fraud. However, as Pomponius says, we should also follow what they have written down or what is agreed, provided we know what it is, and if something has been written down, they who received the slave will nevertheless be liable for fraud which alone is considered in deposit. 11. If I ask you to take something of mine to Titius for him to look after it, the question is put to Pomponius: By what action can I proceed against you? He thinks that the action on mandate lies against you, but the action on deposit against him who received the thing. If, in fact, he receives it in your name, you will then be liable to me on mandate, but he will be liable to you on deposit, which action you will cede to me when sued on the mandate. 12. Where I gave a thing to you on the condition that if Titius did not accept it, you would look after it, and he did not accept it, it must be considered whether there is only an action on deposit or also an action on mandate. Pomponius is unsure, but I think that there is an action on mandate because mandate was of greater scope with reference to the holding and terms of safekeeping. 13. Similarly, Pomponius asks: If I give you a mandate to look after a thing received from someone else in my name and you do this, are you liable to an action on mandate or deposit? And he thinks it better that there is an action on mandate because this is the first contract. 14. Likewise, Pomponius asks: If, when I wish to make a deposit with you, you order me in turn to make the deposit with your freedman, may I proceed against you with an action on deposit? He [Pomponius] says that had I deposited in your name, this is as if you were doing the safekeeping, and the action on deposit lies to me against you. If, on the other hand, you urge me rather to deposit with him, there is no action against you, but an action on deposit against him. Nor are you liable to an action on mandate because you have managed my affairs. However, if you have given me a mandate to deposit with him at your risk, I [Ulpian] do not see why there is no action on mandate. Clearly, if you have acted as verbal guarantor for him, Labeo says that the verbal guarantor is liable in every case, not only if he who has undertaken the deposit has been guilty of fraud, but even if he has not been guilty of fraud, where the property is still held by him; for example, what if he with whom the deposit was made was mad or is a *pupillus* or if there was no heir, *bonorum possesso*, or successor to his estate? You will be liable therefore to make good what is customary in an action on deposit. 15. It is asked whether an action on deposit can be given against a *pupillus* with whom a deposit was made without the authority of his tutor. The action ought to be allowed if you deposit with one then capable of fraud, and he was guilty of fraud; for the action is given against him to the extent of his enrichment even if there has been no fraud. 16. If a deposit is returned in a worse condition, the action on deposit can be brought as if it has not been given back at all; for when it is given back in a worse state, it can be said that it is fraudulently not returned. 17. If my slave deposits, no less will I have the action on deposit. 18. If I deposit with a slave and bring suit against him following manumission, Marcellus says that the action does not lie, although we are accustomed to say that he ought to be liable for fraud committed even in slavery on the principle that both wrongs and injuries follow the person. In this case, there must be recourse to other suitable actions. 19. This action lies to *bonorum possessores* and to him to whom an inheritance has been transferred under the *senatus consultum Trebellianum*. 20. Not only will past fraud be considered in the action on deposit, but even future fraud, that is, that which occurs after joinder of issue. 21. So Neratius writes that if a deposit was lost without fraud and then after joinder of issue was recovered, no less is the defendant rightly to be compelled to make restitution; nor ought he to be absolved unless he returns the property. Similarly, Neratius says that although you have been sued in an action on deposit at a time

when you do not have the power to make restitution, when, for example, the storehouses have been locked, if, however, before judgment you have the power to make restitution, you are to be condemned unless you restore, because you have the property; for it is only to be asked whether you are guilty of fraud when you do not have the property. 22. And moreover it is also written by Julian in the thirteenth book of his *Digest* that he who desposited property can proceed immediately with the action on deposit; for he who has undertaken the deposit is guilty of fraud when, on being asked, he does not return the property. Marcellus, however, says that he who, when asked, does not return the property, cannot always be seen to commit fraud; for instance, what if the property is in the provinces or in storehouses which cannot be opened by the time of the condemnation, or what if the condition for the return of the deposit has not enured? 23. It should not be doubted that this is a good faith action. 24. And, therefore, it must be said that also fruits and all accessories and offspring are taken into consideration in this action lest the bare object alone is considered. 25. If you sold a deposit and afterward bought it back on account of it being a deposit, even if it is later lost without fraud, you will be liable to an action on deposit because you were once guilty of fraud when you sold the property. 26. Also in the action on deposit, the value of what is at issue is sworn. 27. Not only if my slave but also if he who serves me in good faith as a slave deposits property, will it be very right that the action be given to me, if he deposited property belonging to me? 28. By the same token, if I have a usufruct in a slave and if that which he deposited was from the *peculium* supplied by me or if it was my own property, I will be able to proceed with the same action. 29. Likewise, if a slave belonging to an inheritance deposits, the action lies to the heir after he has entered on the inheritance. 30. If a slave deposited, whether he be alive or dead, the master can properly bring this action; however, the said slave who has been manumitted will not be able to bring suit. But if the slave is alienated, the action still lies to him to whom the slave belonged when he deposited, because one must look to the beginning of the contract. 31. If the slave who deposited belongs to two persons, the action on deposit lies in part to each of the masters. 32. If you returned property deposited by a slave to Titius, whom you thought to be his master when he was not, Celsus says that you are not to be liable in an action on deposit because there has been no fraud. The master of the slave, however, will proceed against Titius to whom the property was restored. And if he produces the property, it will be claimed in a *vindicatio*; but if, in fact, he consumes the property, since he knew that it belonged to another, he will be condemned because he committed fraud so as not to remain in possession. 33. It is acutely asked by Julian whether I am liable to an action on deposit if a slave deposited money with me so that I would give it to his master to buy his freedom, and I do. And in the thirteenth book of his *Digest*, he writes that if indeed I give the money in such a manner as to show that it was deposited with me as if for this purpose and I inform you of the fact, the action on deposit does not lie to you because you received knowingly, and, therefore, I am free of fraud. If, on the other hand, I pay for his freedom as if the money is mine, I will be liable. This opinion seems correct to me; for he not only did not give back without fraud, but he did not give back; for to give back is one thing, and to give as if one's own, another. 34. If, from the beginning, money has been desposited with you on the condition that, if you wanted, you would use it, before you use it, you will be liable to an action on deposit. 35. Often it happens that deposited property or monies are at the risk of him with whom they are deposited, for example, if this has been expressly agreed. But also if someone has offered himself as a depositee, the same Julian writes that he assumed the risk of the deposit, so that he is liable not only for fraud, but even for fault and *custodia*, not, however, for an act of God. 36. If money has been deposited in a sealed purse and one of the heirs of the person who deposited appears to claim it back, it must be asked in what way must he be satisfied. The money must be produced either in the presence of the praetor or among honest people and be paid in proportion to his share of the

inheritance. But even if it is opened, providing this happens either by the authority of the praetor or in the presence of honest people, it is not done contrary to the law of deposit. So far as the residue is concerned, this either remains with the depositee if he is agreeable (clearly with the seals having been replaced beforehand, either by the praetor or by those in the presence of whom they were removed), or if he refuses, it is to be deposited in a temple. But if the property is of a nature which cannot be divided, all of it should be handed over, and suitable security must be provided to him by the plaintiff for the property over and above his share. However, if security is not given, the property is to be deposited in a temple, and the depositee is to be free from liability to any action. 37. In the thirteenth book of his *Digest*, such a case has been dealt with by Julian; for he says that if a depositor dies and there are two people disputing between themselves, each one claiming that only he is heir, the property is to be delivered to him who is ready to defend the matter against the other, that is, he who has undertaken the deposit. But if neither undertakes this responsibility, he says it is best to affirm that the question need not be considered by the praetor. The property, therefore, ought be deposited in some temple until the matter of the inheritance is decided. 38. If someone reads out to a number of people testamentary tablets deposited with him, Labeo says that suit can rightly be brought with the action on deposit on account of the tablets. I personally am of the opinion that the action for insult can also be brought if the will has been read out to those present with the intention that the secret dispositions of him who made the will be divulged. 39. If a thief or a robber deposits, Marcellus, in the sixth book of his *Digest*, thinks that even these persons will proceed justly with the action on deposit; for it is of interest to them in that they are held liable. 40. If someone claims silver or gold which has been deposited, ought he to specify the object or also the weight? The better view is that he must specify both, for instance, by naming the goblet, dish, or platter, and by adding both its material and weight. But if it is dyed purple cloth or wool, the weight must similarly be added, save the fact that if there is uncertainty as to the extent of the weight, recourse is made to the swearing of an oath. 41. If a sealed box is deposited, should only the box be claimed or are the contents also to be included? And Trebatius says that the box is to be claimed back, not suit made for the individual things of the deposit. But if the things have been exhibited and deposited under these circumstances, individual objects of clothing can also be claimed. Labeo, however, says that he who deposits a box is also seen to deposit the individual objects; hence, he ought also to sue for these. But what, then, if he who undertook the deposit does not know that there is something in the box? This does not matter since he undertook the deposit. Therefore, I think that suit can also be brought for the individual things of the deposit, although a sealed box has been deposited. 42. It is settled that a son-in-power is liable to an action on deposit, because he is liable to other actions. But suit can also be brought against his father to the limit of the *peculium*. Likewise, in the case of a slave; for suit will be brought against the master. Clearly, both as Julian has written and as it appears to us, if suit is brought in the name of those who are in power, in the trial also any deceit or fraud of him in whose power they are, will be considered, so that also their fraud is considered and not only the fraud of those with whom the contract has been made. 43. If property is deposited with two persons, an action can be brought against each one of them, and the one will not be released if suit is brought against the other; for they are not released by the choice, but by payment. Consequently, if both have committed fraud and the one pays what is at issue, following the example of two tutors, the other will not be sued. But if the one is able to pay nothing or less than required, recourse will be made to the other. And similarly, if the one has not been guilty of fraud and on that account has been absolved, there will certainly be recourse against the other. 44. But if two persons deposit and both bring suit, if, indeed, they deposited on the understanding that one might recover the whole, he will be able to proceed for the whole amount. If, however, the agreement was that only the share in which each of them was interested could be reclaimed, then it is to be said that the condemnation must be made in proportion to the share. 45. If I deposit with you on the understanding that you will make restitution after your death, I can bring the action on deposit against both you and your heir; for I can change my mind and reclaim the deposit before your death. 46. Consequently, if I deposit on the understanding that the deposit is

to be given back after my death, both I and my heir will be able to bring an action on deposit, I having changed my mind. 47. Now because there is only liability for fraud in this action, it has been asked: If an heir alienated property deposited or lent for use to the testator, unaware of the fact that it had been deposited or lent for use, is he liable? And because he was not guilty of fraud he will not be liable for the property. Is he liable then for the price which he received? And the better opinion is that he is liable; for he is guilty of fraud by the fact that he did not give back what came into his hands.

2 PAUL, *Edict, book 31:* What, then, if he has not yet claimed the price, or if he sold the property for less than he ought? He will only be answerable for his own rights of action.

3 ULPIAN, *Edict, book 31:* Clearly, if he can buy back the property and fulfill the obligation, but does not wish to, he is not free from fault, just as if, after the property had been bought back by him or having reacquired it in another way, he refused to return it on the grounds that he sold it once while ignorant of the facts.

4 PAUL, *Plautius, book 5:* But if he is not heir, but thought himself heir and sold the property, the gain will be taken away from him in the same way.

5 ULPIAN, *Edict, book 30:* A contrary action on deposit is given to him with whom there is said to have been a deposit in which action rightly no oath is made respecting the matter in dispute; for the question at issue is not a breach of faith, but the indemnification of him who undertook the deposit. 1. The action on deposit is appropriate for *sequestratio.* So if it is agreed with the sequestrator that he should produce the deposited property at a specified place, and he does not produce it there, it is clear that he is liable to the action. But if a number of places are agreed upon, it is his choice at which place to produce. But if nothing is agreed, he must give notice that he will produce the property before the praetor. 2. If a sequestrator wishes to give up his office, what must he do? And Pomponius says that he ought to approach the praetor and, having made intimation on his authority to those who had chosen him, he must restore the property to him who is present. But I think that this is not always true; for generally, once undertaken, one must not be allowed to lay down the office contrary to the agreement of deposit, unless for very good cause; and when it is allowed, seldom must the property be returned to him who is present, but it ought to be deposited in some temple at the direction of the judge.

6 PAUL, *Edict, book 2:* Now a deposit is properly made with a sequestrator where it is delivered by each of a number of persons in whole with a specified arrangement for the safekeeping and return.

7 ULPIAN, *Edict, book 30:* If a man was deposited for the purpose of his cross-examination and on account of the prolonged binding or bad quarters the sequestrator, through pity, sets him free, I am of the opinion that what has been done is close to fraud, because, since he knew for what purpose the slave was deposited, he exercised his pity inopportunely, since he could rather not have undertaken such a task than have engaged in deceit. 1. The action on deposit is given in whole against the heir on account of the fraud of the deceased; for although on other occasions we are not usually held liable for the fraud of the deceased, unless for that part which has come into our hands, this fraud nevertheless proceeds from the contract which is reipersecutory, and, therefore, one heir is liable for the whole amount, several, however, for that part for which each is heir. 2. Whenever moneylenders become insolvent, it is customary for account of the depositors to be taken first, that is, of those who had money on deposit, not money at interest with the moneylenders, or invested in conjunction with the moneylenders, or left with them to make use of. This is the position so long as account is not taken of those who received interest also afterward, as if they renounced the deposit. 3. Likewise, it is asked whether the order in which those who

deposited should be considered or whether, in fact, account should be taken of all the depositors together. And it is settled that they should be taken together; for this view is expressed in an imperial rescript.

8 PAPINIAN, *Questions, book 9:* The said privilege is exercised not only over the remainder of the deposited money found in the property of the moneylender, but over the whole property of the defrauder. And this has been adopted on the ground of public utility on account of the well-known practice of moneylenders. Clearly, expenses which have been necessarily incurred always take precedence; for once this has been deducted, it is customary for a calculation of the property to be made.

9 PAUL, *Edict, book 17:* If suit is brought in an action on deposit, on account of an act of the deceased, against one of several heirs, I ought to sue for the share of the inheritance. If, however, suit is brought on account of his own wrong, I do not claim for the share; this is correct; for the assessment of the damages refers to the fraud of which this heir is wholly guilty.

10 JULIAN, *From Minicius, book 2:* The action on deposit does not lie against his coheirs who are not guilty of fraud.

11 ULPIAN, *Sabinus, book 41:* What a slave has deposited, he with whom the deposit has been made, according to good faith, very rightly restores to the slave; for it does not conform with good faith to refuse to return what one has accepted, but he will have to make restitution to him from whom he received the property in such a way that he restores without any fraud, that is, that there be not the least suspicion of fault. This statement has been explained by Sabinus, who adds: And no reason has, in the meantime, emerged for him to think that the slave's master does not wish it to be restored, that is to say, that he was in the position to suspect this, prompted, that is, to such suspicion by just grounds. However, it is quite enough that the act is in good faith. But suppose that the slave had previously stolen the property; if, however, the person with whom he deposited did not know this or believed that the slave's master was not opposed to the restoration [the depositee] can be released; for what is required is good faith. Indeed, not only if restoration has been made to [the slave] while still a slave, but even after his manumission or alienation, the discharge occurs on just grounds if the person restores in ignorance that the slave had been manumitted or alienated. The same principle is extended to all debtors by Pomponius.

12 POMPONIUS, *Sabinus, book 22:* If a deposit is made in Asia to be returned at Rome, it is seen to have been intended that this occur, not at the expense of him with whom the deposit was made, but at the expense of him who deposited. 1. A deposit ought to be returned at that place in which, in the absence of fraud on the part of him with whom it was deposited, it is now to be found; where, in fact, it was deposited makes no difference. The same is to be said generally of all good faith actions. But it must be said that if the plaintiff wants the property to be conveyed to Rome at his own expense and risk, he is to be heard, since this is also covered by the action for production. 2. One proceeds rightly with the action on deposit for *sequestratio* against the sequestrator, which action ought also to be given against his heir. 3. Just as in the case where, after joinder of issue, what had to be delivered on a stipulation or under a will perished with loss to the defendant, so also a deposit, from the day on which the action on deposit was brought, is at the risk of him with whom it was deposited, if at the time of joinder of issue he was able to restore it but did not.

13 PAUL, *Edict, book 31:* If someone denied a deposit, not to the owner, but because he did not think that he who was claiming the deposited property was the true procurator or heir of him who had deposited, he has been guilty of no fraud. On the other hand, if he discovers the facts, suit can be brought against him since he now begins to be guilty of fraud if he does not wish to return the property. 1. Even a *condictio* is competent on account of deposited property, but not before there has been fraud; for

no one is liable to a *condictio* simply because he undertakes a deposit, but, in fact, because he is guilty of fraud.

14 GAIUS, *Provincial Edict, book 9:* If there are several heirs of him who deposited, it is said that if the majority enter, the property must be returned to those present; but that the majority must be understood, not exactly in terms of the number of people, but in terms of the size of the shares of the inheritance. Suitable security is to be given in return. 1. Whether, in fact, suit is brought against the person with whom a deposit was made, or against his heir, and before the property has been adjudged it is lost through the natural order of things; for example, if a slave dies, Sabinus and Cassius said that he against whom suit was brought ought to be absolved, because it was just that the natural loss fall on the plaintiff, especially since that property would have perished even if it had been returned to the plaintiff.

15 JULIAN, *Digest, book 13:* He who has his own property deposited with him or who asks for its use is liable neither to the action on deposit nor to the action on loan for use, just as he who hires his own property or who asks for it on *precarium* is liable neither on the *precarium* nor to the action on letting.

16 AFRICANUS, *Questions, book 7:* If he with whom you deposit property deposits it with someone else and that person is guilty of any fraud on account of the fraud of him with whom the deposit was afterward made, he with whom you deposit is liable to the extent that he must assign his actions to you.

17 FLORENTINUS, *Institutes, book 7:* That several persons are able to deposit, just as is one, is lawful; however, it is not so with a sequestrator unless several deposit; for this is done when there is a dispute over some piece of property. And so in this case, each one is seen to have deposited the property in its entirety, because it is a different case from where several persons deposit a piece of common property. 1. The ownership of deposited property remains with the depositor but also the possession unless it was deposited with a sequestrator; for then only the sequestrator will possess; for by this form of deposit the object is that that period of time runs toward the possession of neither depositor.

18 NERATIUS, *Parchments, book 2:* With regard to that which has been deposited as a consequence of tumult, fire, disaster, or shipwreck against the heir on account of the fraud of the deceased, the action is with regard to his share of the inheritance for simple damages and also annual; against the heir himself the action is given for the entire amount, for double damages, and in perpetuity.

19 ULPIAN, *Edict, book 17:* Julian and Marcellus think that a son-in-power can properly bring an action on deposit.

20 PAUL, *Edict, book 18:* If without fraud on your part, you lose property deposited with you, you are neither liable to the action on deposit, nor must you give security that if you recover the property you will return it. If, however, you do acquire it a second time you are liable to the action on deposit.

21 PAUL, *Edict, book 60:* If property was deposited with a son-in-power and he retains it following emancipation, the father ought not to be held liable in the action on the *peculium annalis*, but the son himself. 1. Furthermore, Trebatius is of the opinion that even if the deposit was made with a slave and he retains it following manumission, the action must be given against him and not against the master, although an action is not given against the manumitted slave in the remainder of cases.

22 MARCELLUS, *Digest, book 5:* If two heirs interfere with property deposited with the deceased in a certain case at least they will be liable in shares; for if they divide the ten thousand which had been deposited with the deceased and take five thousand and both are solvent they are liable in shares, because the pursuer has no greater interest. But if

they melt down a dish or allow it to be melted down by someone else or have committed any other kind of fraud, they could be sued for the whole amount, just as if they themselves had undertaken the safekeeping; for it is certainly true that each has been wholly guilty of fraud and the property can be returned only in whole. Nor for all that will the view sound absurd of those who think that clearly he against whom suit is brought cannot be released except by restitution of the entire property, but that he must be condemned, if the property is not returned, in proportion to that part for which he is heir.

23 MODESTINUS, *Distinctions, book 2:* When sued in the action on deposit, once the return of the slave is settled, suit is rightly brought before the same judge on account of food supplied.

24 PAPINIAN, *Questions, book 9:* "Lucius Titius to Sempronius, greetings. As to the hundred coins which this day you entrusted to my safekeeping, counted out with the slave Stichus, acting as manager, that you be informed of the fact that they are in my possession, I make this known to you in the present letter written in my own hand. These coins I will pay to you on demand when you wish and where you wish." A question is raised on the ground of accrual of interest. I replied that there is cause for the action on deposit; for what is "to entrust for safekeeping" other than to deposit. This statement is true if the arrangement was that the very same coins be returned; for if it was agreed that an equivalent sum be repaid, then the matter exceeds the very well-known limits of a deposit. In such a case, if an action on deposit does not lie, since it was agreed that an equivalent amount, not the very same coins, should be returned, it must be said that it is not easy whether an account should be taken of the interest. And it has, indeed, been laid down in the good faith actions that so far as interest is concerned the office of the *arbiter* should count as much as the stipulation. But it is contrary to good faith and to the nature of deposit to expect interest before delay [in the return of the money] from the man who conferred a kindness by taking it into safekeeping. If, however, there was agreement from the beginning concerning the payment of interest, the clause of the contract shall be observed.

25 PAPINIAN, *Replies, book 3:* Where a father received property presented to a girl who was independent on the day of her betrothal or afterward, his heir, to make him produce the property, will rightly be sued with the action on deposit. 1. He who has had unsealed money deposited with him on the understanding that he would return a similar amount and who converts it to his own uses is, after default, also to be condemned for interest in the [civil law] action on deposit.

26 PAUL, *Replies, book 4:* Publia Maevia, when she was setting out to visit her husband, entrusted to Gaia Seia a locked chest containing clothing and documents and said to her: "If I return safe and sound give it back to me; however, if something happens to me, give it to my son whom I had by my first husband." She, having died intestate, I want to know to whom the entrusted properties ought to be returned, to her son or to her husband. Paul replied, to her son. 1. Lucius Titius made a declaration as follows: "I have received and have on deposit the above-mentioned ten thousand denarii; and I shall do everything and agree and have promised as has been set out above; and I have bound myself to pay you as interest for each mina, four oboli every month, until the whole sum is paid off; I ask whether interest can be claimed. Paul replied that that contract about which inquiry is made exceeds the limit of a deposit of money, and, therefore, in accordance with the agreement, interest can also be claimed in an action on deposit. 2. "Titius to the Sempronii, greetings. I have received from you, in a sealed bag, approximately ten [units] by weight of gold and two plates. On

these you owe me the ten [sesterces] which you deposited with Titius; likewise, the ten belonging to Trophimatus, and similarly ten and something more besides on your father's account." I put the question whether any obligation has arisen from a document of this kind, that is, as concerns the case of the money and that alone. He [Paul] replied that no obligation appears to have arisen from the letter about which the question is put, but that it can serve as proof of the deposits of the property. But whether also he who made a declaration in the same letter to the effect that ten [sesterces] were owing to him can prove what he wrote, a judge would have to investigate.

27 PAUL, *Replies, book 7:* Lucius Titius, when he had his daughter Seia in his power, gave her in marriage to Pamphilus a slave belonging to another, to whom he also gave dowry, which he transferred in the *cautio* as a supposed deposit; and thereafter, no intimation having being made to the master, the father died and soon afterward also Pamphilus the slave. I ask: By what action can Seia claim the money, since she was heir to her father? Paul replied that seeing that a dowry could not have been constituted, the money must be reclaimed with an action on the *peculium* on account of deposit.

28 SCAEVOLA, *Replies, book 1:* Quintus Caecilius Candidus wrote a letter to Paccius Rogatianus in the following terms: "Caecilius Candidus to Paccius Rogatianus, greetings. As to the [twenty-five] sesterces, which you wished to be lodged with me, I inform you by this letter that they have been entered on my account. I shall attend to this sum as soon as possible, to see that you do not have it lying idle [producing no return]. That is to say, I shall make it my business that you get interest on it." It was asked whether on the basis of this letter interest also could be claimed. I replied that in a good faith action interest is owed whether Caecilius simply held the money or whether he used it in his own affairs.

29 PAUL, *Views, book 2:* If I deposit silver or a sealed purse and he with whom the deposit was made interferes with it without my consent, both the action on deposit and on theft lie to me against him. 1. If deposited money is used with my permission by him with whom it has been deposited, as in the other good faith actions, he is compelled to pay me interest on that account.

30 NERATIUS, *Replies, book 1:* If a verbal guarantor, on your account with whom the deposit was made has been condemned for the value sworn by the plaintiff, the property becomes yours.

31 TRYPHONINUS, *Disputations, book 9:* The good faith that is required in contracts calls for level dealing in the highest degree; but do we assess level dealing by reference to the law of nations only, or, in truth, in connection with the precepts of the civil and praetorian law? Suppose, for example, a defendant on a capital charge has deposited with you a hundred sesterces; he is then deported and his property forfeited to the state. Are the hundred sesterces to be restored to this man or should they pass to the state? If we look only to the law of nature and nations, the money should be restored to the man who gave it; if we look to the civil law and the legal order, it should rather be surrendered to the state; for a person who has offended against the state ought also to suffer indigence so that by his example to others he serves to deter wrongdoing. 1. A further observation is to be made here. As to good faith, are we to assess it simply as between those who are party to the contract with no consideration of an outside individual, or are we to assess it having regard also to other persons whom the matter concerns? For example, a thief takes what is mine and deposits it with Seius who has no idea of the wrongdoing of the depositor. Ought Seius to restore the property to me or to the thief? If we consider the giver and the receiver by themselves, this is what good faith requires: that the man who gave the thing should

recover what he entrusted. If we look at considerations of equity in the whole matter, something attained through regard for all the persons who are concerned with this transaction, the property should be restored to me from whom it was taken by this very wicked act. And I think that this is justice which gives to each his own in such a way that it is not removed from any person with a more just claim. But nonetheless, if I do not move to recover the property, it should be restored to him who made the deposit, even although he deposited having obtained the property wrongfully. Marcellus writes in support of this view with reference to a robber and a thief. However, if a thief, in ignorance from whose son or slave he had stolen property, deposited it with his father or master who was also unaware of the facts, under the law of nations it does not constitute a deposit whose terms are that an object be given to another for safekeeping, not to the owner his own property as if belonging to another. And if a thief takes an object from me without my knowing and then deposits it with me, still in ignorance of his wrong, it will rightly be contended that there is no contract of deposit since it is not in accord with good faith that the owner be compelled to restore his own property to a robber. And suppose, while still in ignorance of the facts, the property be surrendered by the owner as if on the grounds of the deposit, the *condictio* for something not due will nevertheless be competent.

32 CELSUS, *Digest, book 11:* The statement made by Nerva that gross fault is equivalent to fraud was not accepted by Proculus but seems to me to be very true. For even if a person is not careful in the degree required by the nature of man, still, unless he shows in the deposit the care customary with him, he is not free from fraud; for good faith is not maintained if he shows less care than in relation to his own affairs.

33 LABEO, *Posthumous Works, Epitomized by Javolenus, book 6:* Your slave, in conjunction with Attius, deposited money in sequestratio with Maevius, on the condition that if it were to prove that it was yours, it should be returned to Attius. I said that suit could be brought for an unspecified thing against him with whom the money had been deposited, that is, [with] the action for production, and once it had been produced, the money could be vindicated, because a slave in depositing could not make your position in law worse.

34 LABEO, *Plausible Views, book 2:* You can proceed with the action on deposit against one who refused to return the deposit to you except upon payment from you, even if he returned it without delay and undamaged.

BOOK SEVENTEEN

1

THE ACTION ON MANDATE OR THE COUNTERACTION

1 PAUL, *Edict, book 32:* The obligation of mandate rests on the consent of the contracting parties. 1. Therefore, a mandate can also be entered into by means of a messenger or a letter. 2. Similarly, the action on mandate lies whether the party writes "I ask" or "I wish" or "I give a mandate" or using any other form of words whatsoever. 3. Again, a mandate can be contracted to be postponed until a future day or subject to a condition. 4. There is no mandate unless it is gratuitous. The reason is that it derives its origins from duty and friendship, and the fact is that payment for services rendered is incompatible with this duty. For if money is involved, the matter rather pertains to hire.

2 GAIUS, *Common Matters, book 2:* A mandate is contracted between us if I give you a mandate in my interests alone or in those of a third party alone or in those of myself and a third party or in those of both you and me or in those of yourself and a third party. However, if I give you a mandate that is exclusively in your interests, the mandate is redundant, and, for that reason, no obligation arises from it. 1. A mandate is in my interests alone if, for example, I give you a mandate to administer my affairs or to purchase a farm for me or to give a verbal guarantee on my behalf. 2. [It is] in the interests of a third party alone if, for example, I give you a mandate to administer the affairs of Titius or to purchase a farm for him or to give a verbal guarantee on his behalf. 3. [It is] in the interests of myself and a third party if, for example, I give you a mandate to administer the affairs of Titius and myself or to purchase a farm for Titius and me or to give a verbal guarantee on our behalf. 4. [It is] in your interests and mine if, for example, I give you a mandate to lend at interest to one who is borrowing in connection with a transaction with me. 5. [It is] in your interests and those of a third party if, for example, I give you a mandate to lend at interest to Titius; but if [the mandate is] that you should make an interest-free loan, the mandate is in the interests of the third party alone. 6. The mandate is in your interests alone if, for example, I give you a mandate to invest your money in the purchase of land rather than lend it out at interest or, conversely, to lend it out at interest rather than invest in the purchase of land. A "mandate" of this type is advice rather than a mandate and, for this reason, does not impose a [legal] obligation, as no one incurs an obligation as the result of [giving] advice, even if the advice was not in the best interest of the person to whom it was given; for everyone is free to ascertain for himself whether advice is to his advantage.

3 PAUL, *Edict, book 32:* Further, in a claim based on mandate, the following point is also taken into account: Occasionally, the condition of the mandator cannot be improved, sometimes it can be improved, but it can never be made worse. 1. Indeed, if

I gave you a mandate to purchase a certain thing for me without setting any limits as to price and you made the purchase, an action is available to each of us. 2. However, if I specified a price and you bought at a figure in excess of this, some [authorities] have held that you do not have the action on mandate, even though you may have been prepared to let the excess go; for it is inequitable that I should not have an action against [the buyer] if he is unwilling [to pay the difference], but that he should have one against me if he is willing [to do so].

4 GAIUS, *Common Matters, [or Golden Sayings] book 2:* But Proculus is of the opinion, and rightly, that [the buyer] will have an action up to the limit of the price specified. This is certainly the more liberal view.

5 PAUL, *Edict, book 32:* Consequently, the limits placed on a mandate must be scrupulously observed; 1. for a man who has gone beyond them is held to do something other [than he was charged to do], and if he does not carry out the task he has undertaken, he is liable. 2. Thus, if I give you a mandate to purchase Seius's house at one hundred and you purchase Titius's house which is worth much more, even at one hundred or a still lower price, you are not regarded as having carried out the mandate. 3. Again, if I give you a mandate to sell my farm for one hundred and you sell it for ninety and I bring an action for the farm, a defense will not prevail against me, unless you make good to me the balance which is outstanding under the terms of my mandate and generally ensure that I suffer no loss. 4. Further, if a master instructs his slave to sell something at a certain price and the slave sells at a lower figure, the master is similarly entitled to bring a *vindicatio* for the thing, and no defense will prevail against him, unless he is given security against financial loss. 5. The position of the mandator can be improved if when I gave you a mandate to purchase Stichus for ten and you bought him at a lower price, or for that figure, [but on condition] that something else be included with the slave; for in each case, you have done [what was mandated], either [not going] beyond the stated price or [keeping] within it.

6 ULPIAN, *Edict, book 31:* Should there be a token of esteem by way of remuneration, the action for mandate will lie. 1. If a man is given a mandate to administer the affairs [of the mandator], he must be sued by means of this action; an action against him for unsolicited administration will not be appropriate. The reason is that he has incurred a [legal] obligation, not because he has been administering the affairs of another, but because he has undertaken a mandate. And so, he is liable even if he has not administered [the affairs of the mandator]. 2. If I have allowed someone to give a verbal guarantee on my behalf, or to stand surety for me in some other way, I am liable [to an action] on mandate, and unless the party gave his guarantee against my will either with the intention of making a gift or as an unsolicited administrator of [my] affairs, the action on mandate will lie. 3. A mandate for an immoral purpose is void and thus will not be subject to this action. 4. Should I give you a mandate that is not in my interests—for example, that you should stand surety for Seius or lend to Titius—I will have the action on mandate against you, as Celsus tells us in the seventh book of his *Digest*, and I am under a [legal] obligation to you. 5. However, if I gave you a mandate which was in your interests, the action on mandate will not lie, unless it was in my interest as well; or if you would not have performed the act, had I not given you a mandate, [then], even if I had no interest in the matter, the action for mandate will still lie. 6. The question is put in the thirteenth book of Julian's *Digest:* If a principal instructed his procurator to take a certain sum of his money and lend it at his [the procurator's] risk on the terms that he would pay only a certain rate of interest to the principal; if he was able to lend at higher, he himself would take the profit; he seems, he says, to have taken the money as a loan. Clearly if the administration of all the principal's affairs were mandated to him, he would also be liable to the action on mandate, just as a debtor is usually liable in mandate who looked after his creditor's affairs. 7. A certain Marius Paulus had given a verbal guarantee for Daphnis, having

agreed upon a reward on account of his guarantee, and under the name of another he took an undertaking that he would be paid a certain amount from the outcome of the lawsuit. He was ordered by the praetor, Claudius Saturninus, to pay a larger amount into court, and the same Saturninus forbade him from court pleading. It seems to me that he had guaranteed he would pay a judgment debt and was in the position of one who had bought up the lawsuit, and wanted to recover from Daphnis by the action on mandate because he had suffered condemnation. But the Deified Brothers very properly declared in a rescript that he had no action because of his sharp practices because, having made an agreement for payment, he proceeded to this kind of a buying up of the right of action. Marcellus, however, says about a person who gave a verbal guarantee when he had accepted payment that if the agreement indeed was that he should guarantee at his own risk, he had no action: but if it was not so agreed he does have an *actio utilis*. This view is consistent with utility.

7 PAPINIAN, *Replies, book 3:* If proceedings have been started *extra ordinem* to obtain a fee which it has been agreed to pay to a procurator, it will have to be considered whether his principal wished to remunerate him for his services and thus the terms agreed ought to be honored or whether, contrary to sound morals, the procurator has undertaken the risk of the suits [he is conducting] for a consideration in the hope of obtaining a larger sum [for his efforts].

8 ULPIAN, *Edict, book 31:* If I appoint a procurator and he does not return the documents relating to the case to me, under which action may he be liable to me? Labeo takes the view that he is liable on mandate and that the opinion of those who hold that an action on deposit can be raised on these grounds is not sustainable; for one must look to the origins of each and every contract and the factors lying behind it. 1. Indeed, if the opponent is absolved owing to collusion on the part of the procurator, [he considers that] the latter is liable on mandate. However, should the [procurator] be insolvent, he says that then an action for fraud should be granted against the defendant who was absolved by reason of the collusion. 2. Moreover, it is settled that [a procurator] is liable on mandate in respect of the conduct of a lawsuit which he has undertaken. 3. Suppose that one man gives a mandate to another to administer the affairs of a third party who has himself given him [the mandator] a mandate [to this effect]. He will be entitled to an action on mandate because he himself is also liable [to the same action] (he is liable because he can administer the affairs himself); for although it is generally held that one procurator may not appoint another procurator before joinder of issue, nevertheless there is an action on mandate; for this prohibition only [extends to the appointment of a procurator] for the purpose of conducting the case. 4. If a number of tutors give a mandate to their co-tutor to purchase a slave for their *pupillus* and he fails to do so, does the action on mandate lie? And is the action on mandate the only one [available], or does the action on tutelage also lie? Julian draws a distinction here. He states that the matter turns on the type of slave the tutors charged one of their number to buy. If the slave is not needed or actually [proves to be] troublesome, [the tutor who undertook the mandate] is liable to the action on mandate only, and not to one on tutelage. If, however, the slave is needed, he is liable to an action on tutelage—and not only he, but his co-tutors as well. For even although they charged [him to purchase the slave], they would be liable [to the action] on tutelage [to show] why they failed to obtain a slave needed by their *pupillus*. Therefore, they are not freed from liability because they gave a mandate to their co-tutor; the reason is that they ought to have made the purchase themselves. However, they will nonetheless be entitled to an action on mandate because the mandate was not carried out. On the other hand, Julian also says that the tutor who has made the purchase will have the action on mandate against his co-tutors. 5. Suppose that a freeman, when serving as a slave in good faith, gave a mandate to Titius to redeem him and provided the cash [required for this] from his *peculium*, which *peculium* was to follow him and not remain in the hands of the man who purchased him in good faith; and suppose that

Titius, after the purchase price had been paid, manumitted the freeman, who was thereafter declared to be freeborn. Julian holds that he is entitled to an action on mandate against the man whom he charged with redeeming him, but that the proceedings on the action will be limited to compelling [the defendant] to assign to him the actions which he has against the man from whom he made the purchase. However, if the money which he provided came from a *peculium* belonging to the man who purchased him in good faith, Julian says that no actions can be assigned to him, because [the purchaser] has none, as he gave to the seller his own money. Indeed, as Julian says, he will remain under the [legal] obligation arising from the sale, but this action would be of no effect either, because whatever the seller recovered, he would be obliged to hand over by the action on sale. 6. The action on mandate is competent when the person who gave the mandate first has an interest; but if he ceases to have an interest, the action on mandate does not lie; what is more, the action only lies to the extent of his interest. For example, suppose that I have given you a mandate to purchase a farm; if the purchase was in my interest, you will be liable. But if I myself have purchased the farm in question or a third party [has done so] for me, and I have no interest, the action on mandate is not available. [Again, suppose that] I have given [you] a mandate to administer my affairs. If no loss has been incurred, even though no one attended to their administration, no action lies; or if a third party has administered them in a satisfactory manner, the action on mandate is not available. This same rule should be observed in cases similar to this. 7. If verbal guarantors, being unaware that the [principal] debtor had made payment or again that he had been discharged by means of a formal release or a pact, have made payment [again] out of moneys belonging to the debtor, they will not be liable to an action on mandate. 8. This also applies to the verbal guarantor's action. This may be deduced from a rescript of the Deified Brothers couched in the following terms. "To Catullus Julianus. If those who gave a verbal guarantee on your behalf, have had judgment given against them for a larger sum than a computation of the debt demanded, and, with full knowledge and forethought, have failed [to use] the remedy of an appeal, then, should they bring an action on mandate, you can protect yourself by [appealing to] the fair-mindedness of the judge." Thus, if they were unaware [of the facts], their ignorance is excused. But if they were aware, it was their binding duty to appeal; indeed, if they failed to appeal, they acted in bad faith. What, however, if they were prevented [from doing so] by lack of funds? [In that case], their poverty is excused. Indeed, if they called on the debtor in the presence of witnesses to appeal if he himself thought it advisable, my opinion is that they have acted reasonably. 9. However, a man who has not handed over what he is able to hand over is held to have acted in bad faith. 10. And so if I have given you a mandate to buy a slave and you have bought [him], you will be liable to me for his delivery. Indeed, you will be liable, if you have neglected to make the purchase as a result of bad faith (for example, if you have accepted a bribe from a third party to stand down so that he could buy [the slave]), or if [you have failed to make the purchase] through gross negligence (for example, if, being kindly disposed toward another, you have allowed him to buy [the slave]). Further, even if the slave whom you purchased has fled, you will be liable if this was the result of bad faith on your part. But if there has been no bad faith or fault, you will only be liable to give an undertaking that you will turn the slave over [to me], should it become possible for you to do so. Furthermore, if you hand him over, you must convey him [to me]. And if an undertaking has been given in respect of eviction, or you are in a position to request that [such an] undertaking be given to you, I think it sufficient if you allow me to take over this action, by making me a procurator in connection with my own affairs; nor will you be liable to pay any more than you would obtain.

9 PAUL, *Edict, book 32:* You must also give an undertaking in respect of your intromissions.

10 ULPIAN, *Edict, book 31:* The same also applies with respect to land, if a procurator has purchased a farm; for a man who acts as a procurator need do no more than good faith demands. 1. Indeed, if an undertaking has been or can be given to a procurator in respect of the physical condition of a slave or in respect of other defects, the same rule will apply; or if, through his own fault, he does not ensure that such an undertaking is given, he will be condemned. 2. If my procurator has obtained fruits from a farm which he purchased for me, it is the duty of the judge to compel him to make these over, too. 3. If my procurator retains money of mine, he will certainly have to pay me interest, should he delay [handing it over]. Indeed, if he has lent my money out at interest and has obtained interest, we hold in consequence that he must pay [me] whatever profit he has made, whether I gave him a mandate [to lend] or not. The reason is that it is consistent with good faith that [one man] should not enrich himself from the property of another. However, if he did not lend the money out at interest, but converted it to his own use, he may be sued for interest at the statutory rate which is observed in that district. Finally, Papinian holds that

even if the procurator exacts interest and turns this to his own use, he must pay over that interest. 4. Papinian writes in the third book of his *Replies* that if a man gives a mandate to Titius to borrow money from his [the mandator's] stewards, he may not bring an action on mandate, because [Titius] is liable for money as lent for consumption; and so, he cannot sue for interest on the basis of mandate, if [interest] was not provided for by stipulation. 5. In the same book, Papinian also tells us that if a verbal guarantor, who gave his guarantee because the principal debtor had given a mandate to his procurator to borrow money, has been found liable, he should be given an *actio utilis* on the analogy of that for a business manager's conduct because in these circumstances also [the principal debtor] may be held to have made [the procurator], as it were, responsible for the borrowing of money. 6. If I give a man a mandate to take a stipulation from Titius, I can bring an action on mandate against the party I so charged to have him give Titius a formal release, if this is my wish; or, if I prefer, I can bring an action to have him assign [Titius] to me, or to anyone else whom I choose, as debtor by *delegatio*. In the same book, Papinian writes that if a mother has given a dowry on behalf of her daughter and, having been mandated by her daughter, has made a stipulation in respect of it at that time or even subsequently, she is liable to an action on mandate even though it was she herself who gave the dowry. 7. Suppose that a man gave a mandate that the matters to which his procurator and slaves were attending would be ratified only if Sempronius were present at the completion of the transactions; if a bad debt has been contracted, Sempronius, who has in no respect acted in bad faith, is not liable. It is also true that a man who has intervened [in the affairs of another], not with the intention of acting as his procurator, but [who] has pledged his affection and friendship by advising procurators and stewards and guiding them with his advice is not liable to an action on mandate; and if he has done anything in bad faith, he will be liable, not to an action on mandate, but rather to one for fraud. 8. Suppose that I give a mandate to my procurator to lend my money to Titius without interest and he makes the loan, but at interest; let us consider whether he must hand over the interest to me as well. Labeo writes that he ought to do so, even if I charged him to make an interest-free loan; although, should he have lent the money at his own risk, Labeo holds that an action on mandate to recover the interest would not lie. 9. Labeo says and rightly that this action also admits of set-off. Thus, while a procurator can be constrained to hand over fruits, he is also entitled to deduct any expenses he has incurred in collecting them; indeed, if he has incurred any expenses while traveling to the estates [of his principal] for the purpose of transporting the fruits, I think he should take these expenses, too, into account, unless he was in salaried employment and it was agreed that he should meet the expenses of such journeys out of his own pocket, that is, out of his salary. 10. Labeo also says that if a procurator has incurred any expenses outwith the terms of the mandate in connection with his own pleasure, he should be allowed to remove [any object so acquired] insofar as this can be done without financial loss to his principal, unless the latter is willing to take that expense into account. 11. Verbal guarantors and mandataries have a right of action on mandate even if they have performed an obligation without suit being brought. 12. Julian holds that as a general rule, if a verbal guarantor fails [to plead] a defense which was personal to him and which the principal debtor could not have used, [then] if the defense was not an honorable one, he will have the action on mandate. However, if the defense was one which the principal debtor could have used and he [the guarantor] did this knowingly, he will not have the action on mandate, provided that he had the power to call on the principal debtor and to require him to defend the suit in his place, either in his own name or in that of a procurator. 13. If a creditor releases a verbal guarantor with the intention of making a gift, I think that if the creditor wished to remunerate the guarantor, the latter is entitled to an action on mandate; much more would this be the case, should the creditor have discharged him *mortis causa* or by means of a legacy releasing him.

11 POMPONIUS, *From Plautius, book 3:* If judgment has been rendered against me under my verbal guarantee in favor of a man whose heir I afterward become, I shall have an action on mandate.

12 ULPIAN, *Edict, book 31:* If, however, [a creditor] abandons an action against a verbal guarantor, not by way of remuneration, but primarily with a view to making a gift, [the guarantor] will not have the action on mandate. 1. Marcellus, on the other hand, holds that if a man pays a creditor on behalf of a verbal guarantor with the intention of making a gift to the latter, the guarantor is entitled to an action on mandate. 2. However, he continues, if the verbal guarantor is a son-in-power or a slave and I make payment on his behalf with the intention of making them a

gift, the father or master will not [be able to] bring an action on mandate; this is so, because the party who made payment did not intend to make a gift to the father. 3. However, in the same work, Marcellus does say that if the verbal guarantor was a slave and he has made payment, his master can bring an action on mandate. 4. Should a son-in-power give a verbal guarantee without the authorization of his father, the action on mandate does not lie if there is nothing in his *peculium*. But, if he was so authorized or if payment was made out of his *peculium*, there is even more justification for his father's having an action on mandate. 5. Neratius holds that if I have given a mandate to a son-in-power to make payment on my behalf, his father can bring an action on mandate, whether he himself made payment or the son did so out of his *peculium*. This is a reasonable view to take; for it makes no difference to me who makes payment. 6. If I have given a mandate to a son-in-power to make payment on my behalf, and he does so after he has been emancipated, it is fitting that an action *in factum* should be granted to the son. However, if the father makes payment after the emancipation, he has an action for unsolicited administration. 7. Those who have undertaken a mandate proceed by the counteraction, for example, those who have undertaken to act as procurator in general or for a single transaction. 8. Hence, Papinian raises the following question. Suppose that a patron gave instructions for the conveyance to his freedman of a landed estate which he had bought and for which he had paid two thirds of the purchase price on the terms that the latter was to pay the remainder of the price, and that after paying this sum, the freedman gave his consent to the sale of the land by the patron; can the freedman recover his one third of the price? [Papinian] holds that if, at the outset, the freedman undertook a mandate and did not receive a gift, he can recover by means of the counteraction such of [his third of] the price as remains after the deduction of any rents he has collected in the interim. However, if the patron bestowed a gift on the freedman, the latter is held subsequently to have made a gift to the patron. 9. If you give me a mandate to purchase a particular article for you and I make the purchase with my own money, I will have an action on mandate for the recovery of the price. Moreover, if [I make the purchase] with your money, but spend anything [of my own] in good faith for the purchase of the article, or if you refuse to accept it after it has been purchased, the counteraction on mandate will lie. The same applies if you give me any other mandate and I incur expense in connection with it. I will be able to recover not only what I have spent but also interest. Moreover, not only should interest be allowed on the grounds of delay; the judge should also make an assessment if [a creditor] has demanded payment from his own debtor and he pays [as mandatary], when he as creditor was obtaining interest at a very high rate; for it is perfectly fair that account should be taken of a situation of this kind; or if [the mandatary] himself has borrowed money at a high rate of interest to make payment. Indeed, if [the mandatary] has not released the principal debtor from the [payment of] interest, but if the interest is not available to him or if [the mandatary] has released [the principal debtor from paying] interest at a lower rate, but he himself has borrowed at a higher rate of interest in order to discharge his guarantee, I am in no doubt that he can recover that interest, too, in an action on mandate. And (as has been laid down in a *constitutio*) the judge should reach his decision on all this in accordance with the principles of equity. 10. I have given you money to pay my creditor; you have not done so. You will be liable to me for the interest in this situation, where my creditor also can recover from me the amount due to him with interest. This was laid down by the Emperor Severus in a rescript addressed to Hadrian Demostrates. 11. If a licentious young man gives you a mandate to give a verbal guarantee on behalf of a prostitute and you undertake this commission in full knowledge of the facts, you will not have an action on mandate. The reason is that this case is similar to that of your knowingly lending money to a spendthrift. Indeed, if he further gives you a direct mandate to lend money to the prostitute, he will not be liable on mandate, as the mandate given was contrary to good faith. 12. A certain man had written a letter to his friend in the following terms: "I ask you to regard my friend, Sextilius Crescens, as being recommended to you." He will not be liable to an action on mandate, because the letter was written for the purpose of recommending the man rather than giving a mandate. 13. If a man gives a mandate to lend money to a son-in-power, who is not borrowing in contravention of the *senatus consultum* [*Macedonianum*], but in circumstances where his father will be liable either to the action on the *peculium* and benefit taken or to the action on an authorized transaction, the mandate will be lawful. I have this further comment to make. Should I be in doubt whether [the son] is borrowing in contravention of the *senatus consultum* or not and I would not make the loan to him [if he were] borrowing contrary to the *senatus consultum*; and should someone intervene who maintains that the loan does not run counter to the *senatus consultum* and says, "make the

loan at my risk, you will be safe to lend," I think that there are grounds for mandate and that he will be liable to an action on mandate. 14. If I give a mandate to a creditor to lend after he has made the loan, Papinian quite rightly holds that the mandate is void. If, however, I give you a mandate to grant your debtor a postponement, so that you will delay and not press him for payment, and I state that the money will be at my risk, I think that the entire risk of the loan should rest on the mandator. 15. [Papinian] also holds that if a tutor gives a mandate for the acceptance or approval of a loan which he has made, he will be liable to an action on mandate—that is to say, to his former *pupillus* or the latter's curator. 16. If I give a mandate for the enforcement of a debt and then change my mind, does the action on mandate lie, either to me or to my heir? Marcellus holds that the action on mandate does not lie, because a mandate is extinguished when the intention ceases. However, if you give a mandate for the exaction of a debt and then prohibit this [being done] but receive the money collected, the debtor will be discharged. 17. Marcellus also tells us that if a man has given a mandate for the erection of a monument to him after his death, his heir can bring an action on mandate. Further, if the man who undertook the mandate has erected the monument at his own expense, I think that he can bring an action on mandate, if he was not charged with building the monument at his own expense. For he can also bring an action against the man who gave him the mandate to have the latter provide him with funds for the work, especially if he has already made preparations for the task.

13 GAIUS, *Provincial Edict, book 10:* The same applies also if I gave you a mandate to buy a farm for my heirs after my death.

14 ULPIAN, *Edict, book 31:* There is no doubt that the heir of a verbal guarantor has the action on mandate if he has paid. But if he has sold the inheritance and the buyer has paid, there is a question whether he has the action on mandate. And Julian, in his thirteenth book, writes that the heir has the action on mandate for this reason, that he is liable to an action on the sale to make over his actions and therefore the action on sale lies, because he can make it over. 1. If a verbal guarantor should have two heirs, and one of them should have bought the inheritance from his co-heir and then paid to the stipulator everything for which the deceased had given his verbal guarantee, he will make his co-heir liable to him either by stipulation or by sale; therefore, he [the co-heir] will have an action on mandate.

15 PAUL, *Sabinus, book 2:* If I had given you a mandate to buy a farm and afterward had written to you not to buy it and you had made the purchase before you knew that I had told you not to do so, I will be liable to you on the mandate, lest someone who undertakes a mandate should suffer loss.

16 ULPIAN, *Edict, book 31:* If someone has given me a mandate to do something concerning my own property and I have done it, does an action on mandate lie? And Celsus says in the seventh book of his *Digest* that he gave the following opinion: Aurelius Quietus was said to have given to his resident doctor a mandate to build, at his [Aurelius Quietus's] expense, a ball court, sweating chambers, and other aids to health, at the country place which the doctor had at Ravenna and to which he [Aurelius Quietus] usually withdrew every year; [I said that the doctor,] after deducting the amount by which he had increased the value of his own buildings, could bring an action of mandate for his extra expenditure.

17 PAUL, *Sabinus, book 7:* If I give you a mandate to recover ten from Titius and I

bring an action on mandate against you before they have been recovered and you [then] recover them before judgment is given, it is settled that you must be condemned.

18 ULPIAN, *Sabinus, book 40:* A person who allows someone to be given a mandate by a third party to lend to him is regarded as giving a mandate.

19 ULPIAN, *Sabinus, book 43:* If my slave gave a mandate for purchase of himself so that he might be redeemed, Pomponius elegantly discusses [the question] whether the person who redeemed the slave can, for his part, sue the seller to take the slave back, because the action on mandate is reciprocal. Pomponius, however, says that it is most inequitable that I should be compelled through the act of my own slave to take back a slave whom I had intended to alienate permanently, and in this case the extent of my liability on mandate ought to be that I sold him to you.

20 PAUL, *Sabinus, book 11:* Nothing obtained as a result of a mandate ought to be left in the hands of the person who undertook the mandate, just as he ought not to suffer loss, if he could not recover money [which he] lent at interest. 1. A verbal guarantor has the action for unsolicited administration if he gave a verbal guarantee on behalf of someone who was away; for an action on mandate cannot lie when there was no previous mandate.

21 ULPIAN, *Sabinus, book 47:* Should I have given a verbal guarantee on your behalf on the mandate of a third party, I cannot have an action on mandate against you, any more than a person who gave a stipulation in consideration of a mandate from a third party. But if I acted not just in consideration of the mandate of the one of you but on the mandate of both, I shall have an action on mandate against you as well, just as, if two people had given me a mandate to lend to you, I would have both under an obligation [to me].

22 PAUL, *Edict, book 32:* If I gave you a mandate to give a verbal guarantee on my behalf as from a particular date and you gave the guarantee with immediate effect and paid, the more expedient opinion will be that in the meantime you do not have an action on mandate but [you will have when] the date arrives. 1. The question has also been discussed whether, when I owed a debt from a particular date and you on my mandate gave a verbal guarantee as from that date and paid before the date arrived, you have an action on mandate immediately. And some [authorities] think that there is indeed an action on mandate available—but under deduction of what it is worth to me to have payment postponed to the subsequent date. But the better view to take is that in the meantime no action on mandate can be brought for this sum either, when there may still be some advantage to me in not making even this payment before the [due] date. 2. It sometimes happens that I [can] be dealing with my own affairs and still have an effective action on mandate; for example, when my debtor at his own risk makes a *delegatio* of his debtor in my favor or when I bring an action against the principal debtor at the request of a verbal guarantor; for although I am suing for my own debt, nevertheless I am dealing with his affairs also; therefore, what I fail to recover from the debtor, I will obtain by an action on mandate. 3. If those whose goods, given in pledge, are being sold have put up purchasers and give them mandates to buy the goods, this is regarded as mandate, although from a purely rational standpoint no mandate has been constituted; for when you buy your own property, there is no sale of your property so far as you are concerned. 4. Julian has written that the strongest evidence of the fact that an obligation of mandate [can be] constituted even in respect of the property of the person who undertakes the mandate is afforded by the fact that if I have given one of several heirs who are selling property of the inheritance a mandate to buy it, he is liable to and can bring the action on mandate even in respect of the share of the property which he holds as heir; and that, in fact, if he did not knock down the property to a third party on account of this [mandate which he undertook], he is entitled as a matter of good faith to have the price at which he could have sold [it]; and, on the other hand, if the buyer had not come forward to buy something which [he said] he required because he had instructed the heir to buy it for him, it is most equitable that [the buyer] be given by the action on mandate his interest in having the thing bought for him. 5. A person whose property has been confiscated can give someone a mandate to buy it, and if he [the mandatary] should buy it, there will be an effective action on mandate if he does not act in good faith; and this has been accepted, because, once a person's property has been confiscated, whatever is acquired afterward does not fall to the imperial treasury. 6. Someone who undertakes to despoil a

temple or wound or kill a slave cannot obtain anything by an action on mandate on account of the turpitude of the mandate. 7. If I gave you one hundred to give to Titius and you did not give them but used them up, Proculus says that you are liable both on mandate and on theft, or if I gave them on the basis that you might give any [one hundred] that you wished, on mandate only. 8. If I gave your slave a mandate to pay in my name what I owe to you, Neratius writes that although the slave, having obtained a loan, entered the money in your accounts as received from me, nevertheless, if he did not accept the cash from the creditor expressly in order to pay them in my name, I am not discharged, nor will you have an action against me on mandate; but if he borrowed the money so that he might pay it in my name, the opposite holds in both cases; and it does not matter whether someone else or that same slave accepted in your name what was paid on my account. And this is the more correct view, because whenever a creditor receives his own cash, no discharge of his debtor takes place. 9. My fugitive slave acquired money when he was in the hands of a thief and from it purchased slaves and Titius received them from the seller by delivery. Mela says that by the action on mandate I will be able to sue Titius to hand over [the slaves] to me because my slave was regarded as having given a mandate to Titius to receive them by delivery, provided that he [Titius] did so at the slave's request; but if the seller delivered them to Titius without instructions from him [the slave], then I can bring the action on sale against the seller to deliver them to me, and the seller will recover from Titius by *condictio*, if, thinking that he owed them to Titius, he delivered slaves to him which he did not owe. 10. If a curator in bankruptcy, although effecting a sale, has not paid the money to the creditors, Trebatius, Ofilius, and Labeo have given the opinion that an action on mandate is available against him to those who were present, but an action for unsolicited administration lies to those who were absent. But if he so acted [that is, retained the money] in execution of the mandate of those who were present, no action on unsolicited administration lies to those who were absent, unless perhaps against those who gave a mandate to the curator, claiming to act on behalf of those who were absent; but if they gave that mandate believing that they were the sole creditors, an *actio in factum* must be given to those who were absent against those who gave the mandate. 11. However, just as, on the one hand, there is freedom not to take on a mandate, so, on the other hand, a mandate once taken on ought to be completed, unless notice has been given (and notice can be given provided that the mandator retains an unimpaired right to have the same business conveniently dealt with either personally or through someone else) or if an excessive burden falls on the person who undertook the mandate. And, for example, if a person who received a mandate to buy something did not buy it and did not give notice that he would not be buying it, and this happened through his own fault and not that of someone else, it has been settled that he is liable in the action on mandate; more than that, as Mela also has written, he will be liable if he fraudulently gave notice at a time when he was already too late duly to make the purchase.

23 HERMOGENIAN, *Epitome of Law, book 2:* Of course, if [by reason of] ill-health or deadly enmity,

24 PAUL, *Views, book 2:* or because of the worthlessness of the actions of the defender,

25 HERMOGENIAN, *Epitome of Law, book 2:* or on account of some other just cause, [the mandatary] puts forward excuses, he must be heard.

26 PAUL, *Edict, book 32:* Among the reasons for not proceeding with a mandate, there is also the death of the mandator; for a mandate is dissolved by death. If, however, it has been carried out in ignorance [of the death], the action is said to be available as a matter of expediency. Julian also has written that a mandate is dissolved by the death of the mandator, but that the obligation sometimes continues. 1. If someone has given his debtor a mandate to pay to Titius and the debtor has paid after his [the mandator's] death while being in ignorance of it, he ought to be released. 2. A verbal guarantor is regarded as having laid out money even if a debtor has been transferred by him to his creditor by *delegatio*, although he [the debtor] was not solvent, because a creditor creates a good debt by accepting *delegatio* of a debtor. 3. If a person who wishes to make a gift to a verbal guarantor has [the verbal guarantor's] creditor as his [own] debtor and has discharged him, the guarantor will [be able to] bring an action on mandate immediately in that it makes no difference whether he paid cash to the creditor or released him. 4. Moreover, it must be noted that the verbal guarantor ought not to recover more by the action on mandate than he paid. 5. On your mandate, I gave a verbal guarantee for ten and paid to the procurator of the creditor; if he was a true procurator, I shall at once [be able to] sue on mandate; but if he is not a procurator, I shall recover from him. 6. A mandatary will not [be able to] charge [to the mandator] everything which he would not [otherwise] have spent, for example, because he was despoiled by robbers or lost property in a shipwreck or spent something because he was detained by the sickness of himself or those with him; for these [happenings] ought to be attributed to accident rather than to the mandate. 7. But when a slave, whom you had bought on my mandate, had stolen from you, Neratius says that you will [be able to] bring an action on mandate to have the slave noxally surrendered to you, provided that [the theft] occurred without fault on your part; but if I had known that the slave had this tendency and had not given warning of it so that you could take precautions, then you ought to recover the amount of your interest. 8. On the mandate of his friend, a smith bought a slave for ten and taught him smithing; then he sold him for twenty which he was compelled to pay over in an action on mandate; shortly thereafter he was found liable to the purchaser on the ground that the slave was not sound. Mela says that the mandator will not [have to] make this good to him, unless the slave developed this fault without any bad faith on his [the smith's] part after he had bought him. But if he taught him on the instructions of the mandator, the opposite will be the case; for then he will recover his fee and expenses on food, unless he was asked to do the teaching for nothing.

27 GAIUS, *Provincial Edict, book 9:* If one person has written to another to release his [the addressee's] debtor and [saying] that he will pay the money which he owed, he is liable in the action on mandate. 1. If I have delivered a slave to you on the terms that you should manumit him after my death, an obligation has been constituted; however, there may be occasion for an action by me also, for example, if, having changed my mind, I wish to recover the slave. 2. A person who has undertaken a mandate ought not to abandon performance of the service which he promised if he can perform it; otherwise he will be found liable for the amount of the mandator's interest, but if he has realized that he cannot perform that service, he ought to inform the mandator of this as soon as he can so that he [the mandator] may use the services of someone else if he wishes; but if, when able to inform [the mandator], he has failed to do so, he will be liable for the amount of the mandator's interest; if[, however,] for some reason he should be unable to inform [the mandator], he will be safe. 3. A mandate is also dissolved by the death of the person to whom the mandate was given, if he died before any action had yet been taken on the mandate; and therefore his heir does not have the action on mandate, although he [himself] may have performed the mandate. 4. Expenses incurred in carrying out a mandate, if incurred in good faith, ought to be reimbursed in every case, and it is not relevant that the person who gave the mandate could have spent less if he had done the business himself. 5. If on my mandate you

made a loan to Titius and you have brought an action on mandate against me, I ought not to be condemned unless you have made over to me your actions, which you have against Titius. But if you have sued Titius, I am not indeed released, but I will be liable to you only for what you could not recover from Titius.

28 ULPIAN, *Edict, book 14:* Papinian says in the third book of his *Questions* that the mandator of a debtor by paying does not release the principal debtor by operation of law (for, on account of the mandate, he is paying his own debt and in his own name), and therefore he thinks that actions against the principal debtor should be assigned to the mandator.

29 ULPIAN, *Disputations, book 7:* If a verbal guarantor, sued when he was unaware that the money [sued for] had not been paid over to the debtor, has paid on the basis of his verbal guarantee, can he claim what he paid by the action on mandate? And the position is that if he knowingly failed to plead a defense either of fraud or of money not paid, he is regarded as acting fraudulently (for crass negligence is close to fraud); but where he did not know, there is nothing which can be charged against him. On similar reasoning, even if some defense was available to the debtor, say, of a pact made or of some other matter and, being ignorant [of it], he should fail to plead this defense, it ought to be held that the action on mandate is available to him; for the principal debtor could and should have informed his verbal guarantor, to avoid the possibility of his unknowingly paying what is not due. 1. It will not be a bad idea to discuss whether a guarantor has an action on mandate if he has paid when he did not know that he was under no effective obligation. And if it is the case that he did not know some matter of fact, his ignorance can be admitted [as excuse]; but if it was a matter of law, it should be held otherwise. 2. If, after the debtor had paid, his guarantor [also] paid in ignorance, I think that he has an action on mandate; for the debtor ought to have informed his guarantor that he had already paid, to prevent the creditor perhaps deceiving him and taking advantage of his ignorance and extracting from him the sum for which he gave his verbal guarantee. 3. This same question can be discussed in the case of a guarantor if he did not inform the debtor when he had paid and the debtor has then paid what he ought not to have paid. And I believe that if, when he could have informed him, he did not do so, the guarantor ought to be rejected if he sues on mandate; for it is very close to fraud if he did not inform the debtor after paying; however, the debtor ought to assign his action for money not due to the guarantor so that the creditor does not obtain double [what is due]. 4. However, there are some things which it is not fraudulent for a guarantor to leave out, even knowingly as, for example, if he, whether knowingly or unknowingly, has left out the defense that the procurator [of the other party] has not been correctly appointed; for it is a question of good faith which is in issue; and it is not in accordance with [good faith] to dispute over the niceties of the law, but only over the question whether he was debtor or not. 5. However, in all the examples set out above, where a creditor either receives money which was never paid [over to the debtor] or has received double repayment of money which was paid over [to the debtor], a claim for recovery lies against him, unless the money was paid to him following condemnation [in a lawsuit]; for then, while recovery is excluded because a judicial decision has authority, he is still liable to a criminal charge of *stellionatus* because of his deceitfulness. 6. If a guarantor who alone has been discharged by lapse of time has nevertheless paid the creditor, he will properly have the action on mandate against the principal debtor; for although he has paid after having been released, nevertheless, he has kept faith and released the debtor. If, therefore, he was prepared to defend the principal debtor against the creditor, it is most equitable that he should recover what he paid by an action on mandate. And this seems right to Julian.

30 JULIAN, *Digest, book 13:* If I gave you a slave so that you might manumit him and afterward my procurator forbade you to do so, can I sue on mandate if you manumit him? I gave the opinion that if the procurator had a just cause for forbidding the manumission of the slave whom I had received for the sole purpose of manumitting him—if, for example, he discovered that afterward he had made up false accounts [or] that he

had plotted against the life of his former owner—I shall be liable if I do not follow the instructions of the procurator; but if the procurator had no just cause for giving his instructions that the slave should not be manumitted, he [the principal] will not be able to sue me, although I gave him [the slave] liberty.

31 JULIAN, *Digest, book 14:* If I have given a mandate to look after my affairs to someone who was liable to me in an action for fourfold [damages], but after a year for simple [damages], even although I sue him on mandate after the year, he will have to pay me fourfold; for a person who undertakes to look after the affairs of someone else ought to account for the same in his own case as [he would have to] in the case of others.

32 JULIAN, *Urseius Ferox, book 3:* If I would not have accepted an inheritance unless I had received a *cautio* that any loss would be made good and a mandate to this effect had been given, I think that there will be an action on mandate. However, if someone gave another person a mandate not to reject a legacy [given to him], the case is very different; for taking a legacy could never cause him loss; [but] sometimes an inheritance causes loss. And in short wherever legal transactions are such that a verbal guarantor could come under an obligation in respect of them, I think that an obligation of mandate also comes into existence; and it does not much matter [either] whether someone being present and having been asked gives a verbal guarantee, or gives a mandate, whether absent or present. Moreover, every day one may see suspect inheritances being accepted on the mandate of the creditors, who are undoubtedly liable in the action on mandate.

33 JULIAN, *From Minicius, book 4:* If a person asked to give a verbal guarantee has bound himself for a smaller sum [than that asked], he is properly liable; if for a larger sum, Julian thinks, more correctly and in accordance with the opinions given by most [authorities], that a person who had given a verbal guarantee for a larger sum than he had been asked to give has an action on mandate to the extent to which he was asked, because he did what he was given a mandate to do; for the person who asked him is regarded as having relied on his faith up to the sum for which he asked him.

34 AFRICANUS, *Questions, book 8:* A man who, as procurator, was administering the affairs of Lucius Titius, after recovering money from his [Lucius Titius's] debtors sent him a letter in order to let him know that he had in his hands a certain sum resulting from his administration and that if it were lent to him, he would then owe it as a debt at six percent interest; the question was asked whether on that basis the money can be claimed as lent and whether the interest can be claimed. He [Julian] gave the opinion that it was not lent; otherwise it would have to be held that following any transaction money [due] could become a loan by bare agreement. And this was not the same as the case where, if it has been agreed that money deposited with you should be lent to you, it becomes a loan, because then the [actual] coins which were mine become yours; [nor] again as the case where, if I have authorized you to receive money from my debtor, it becomes a loan; for that is accepted as a matter of benevolent construction. [He went on to say that] from these [remarks] it could be argued that a man who, wishing to give money as a loan for consumption, had given silver to be sold would not, for all that, be right to claim the money as lent; and yet the money derived from [the sale of] the silver would be at the risk of the man who had received the silver. And, therefore, in the case under consideration, it must be held that the procurator would be liable under the action on mandate, to the effect that although the coins would be put at his risk, yet he ought to pay the interest on which there had been agreement. 1. When you were heir in respect of a share, I gave you a mandate to buy for me land belonging to the inheritance at a certain price; you bought [it]. There is certainly no doubt that there is an action on mandate between us in respect of the shares of your co-heirs. However, he [Julian] says that there is room for doubt whether in respect of your share the action ought to be on sale or on mandate; for it would not be unreasonable for anyone to think that in respect of this share a sale had been entered into under condition. And, he says, this would become a most relevant question if I should chance to die before the sale were concluded and you, knowing that I had died, refused to sell to someone else because of my mandate. Would my heir be under obligation to you on

that account? And, conversely, if you sold to someone else would you be liable to my heir? For, if, in fact, there appears to be a sale entered into under a condition, there can be an action, just as if any other condition had been fulfilled after the death [of a party]; but if an action on mandate has to be brought in the same way as if I had given a mandate for purchase of a third party's farm, and then death followed and you knew this, as the mandate has been dissolved, there will be no action available to you against my heir. But even if an action on mandate were to be brought, the same obligations would have to be performed as would have to be performed if an action on sale were brought.

35 NERATIUS, *Parchments, book 5:* If I gave you a mandate to buy for me a farm which is in part yours, it is true that the mandate can be effective in the sense that, having bought up the other shares for me, you must make over to me your share as well. But if it was the case that I gave you a mandate to buy them for a certain price, in proportion to the price at which you have bought up the share [of your co-owners, the price of] your share will be cut down so that it does not go beyond the figure which I gave you in the mandate as a total for the whole purchase; but if I gave you a mandate to purchase without fixing any definite price and you have bought up the shares of the others at various prices, your share ought also to be transferred at a price estimated in accordance with the judgment of an honest man,

36 JAVOLENUS, *From Cassius, book 7:* so as to aggregate all the sums, greater and less, and so produce a share [appropriate] to the man who undertook the mandate. And this most [authorities] approve. 1. Similarly, in that case also where I have given you a mandate to buy at a certain price and you carried out the business advantageously so far as the other shares were concerned and bought more cheaply, as much is to be given you in respect of your share as your interest is worth, provided that it comes within the price specified in the mandate. For what is to be done if those along with whom you owned the farm in common were compelled to sacrifice the property at a token price either because of the necessities of their family circumstances or for some other reason? For you would not have to take a similar loss. But neither ought you to make gain for yourself for this reason, because mandate ought to be gratuitous; nor are you to be allowed to prevent the sale for the reason that you have learned that there is a keener [prospective] buyer of that property than [the buyer from whom] you received the mandate. 2. But if I had given you a mandate to buy a farm which was being sold piecemeal, but on these terms, that I should not be liable on the mandate unless you bought the whole farm, [then] if you could not buy the whole, you are acting on your own account in buying the shares (whether you have a share in that estate or not); and the result will be that a person to whom such a mandate has been given buys the shares at his own risk in the meantime, and unless he has bought the whole, he keeps them [even] against his will. For it is the more acceptable opinion that a mandate can be undertaken on disadvantageous terms like these and the service ought to be provided in buying the shares just as much as in buying the whole by someone who undertook such a mandate of his own free will. 3. But if I had given you a mandate to buy a farm for me without the additional provision that I should not be liable on mandate unless you bought the whole, and you bought a share or certain shares of it, then undoubtedly we will have an action on mandate against one another, although you were not able to buy the remaining shares.

37 AFRICANUS, *Questions, book 8:* I gave a verbal guarantee on your behalf that a particular slave be handed over, and I handed him over in performance of the obligation; when an action on mandate is raised, his value must be related rather to the time at which he was handed over than to that at which the action is raised. And accordingly, even if he has died, there is nonetheless an effective action. A different practice is observed in the case of stipulation; for then regard is had to the time at which the action is raised, unless it happened to be the fault either of the person giving the undertaking that he failed to perform his obligation on the due day or of the creditor that he failed to receive performance; for neither of them ought to benefit from his own underhanded behavior.

38 MARCELLUS, *Replies, sole book:* Lucius Titius allowed Publius Maevius, the son of his body, to pledge their common house to a creditor of the son, [but] not by way of gift; subsequently, on Maevius's dying and leaving a pupil daughter, her tutors brought suit against Titius, as did Titius [against them], each claiming against the other. My question is whether the part of the house which Titius made available to his son for it to be pledged, ought to be released from the pledge by the judge's decision. Marcellus gave the opinion that it would be for the judge to decide whether and when it should be released by reference to the character of the debtor, as also to what arrangement had been reached between the contracting parties, and to the time at which the thing forming the subject of the action had been pledged; for the question for the judge, on which the case turns, is one of those cases. 1. Not unlike that which is very often at issue: whether a verbal guarantor can raise an action to be released from his obligations even before he makes payment. For he need not always wait until he either has paid or, having joined issue, has been condemned, if the principal debtor delays payment for a long time or is undoubtedly squandering his property, especially if the guarantor does not have in his own resources the money to make to the creditor the payment, after which he may sue the debtor by an action on mandate.

39 NERATIUS, *Parchments, book 7:* Both Aristo and Celsus the Elder agreed that it is possible for a thing to be deposited, or a mandate to be undertaken, on the condition that the thing is at the risk of him who undertook the deposit or the mandate. I also think that this is correct.

40 PAUL, *Edict, book 9:* If, in your presence and against your instructions, I become a surety for you, there is no action on mandate nor for unsolicited administration. Some, however, think that an *utilis* [*actio*] ought to be granted; I do not agree with them, following also the view of Pomponius.

41 GAIUS, *Provincial Edict, book 3:* An action on mandate can be given in respect of one party only; for if the person who undertook the mandate exceeds the mandate, he indeed has no right to an action on mandate, but the person who gave him the mandate has a right to an action against him.

42 ULPIAN, *Edict, book 11:* If I give you a mandate to investigate the resources of an inheritance and you buy it from me as if it were of less value [than it is], you will be liable to me on mandate. Similarly, if I have given you a mandate to investigate the means of someone to whom I was about to make a loan, and you report [falsely] that he is solvent.

43 ULPIAN, *Edict, book 23:* A person who has undertaken a mandate to invest money for a fixed period and does this must be sued on mandate to assign his actions when the period has elapsed.

44 ULPIAN, *Edict, book 62:* It is fraud if someone [under a mandate] declines to pursue an action which he is able to pursue, or declines to pay over what he has recovered.

45 PAUL, *Plautius, book 5:* If you buy a farm at my mandate, would you have an action on mandate against me when you hand over the price, or before you hand it over, so that you may not be under the necessity of selling your own property? It is correctly stated that an action on mandate lies for me to assume the obligation which the seller holds against you; for I also can raise an action against you in order that you should make available to me your actions on sale against the seller. 1. But if on my mandate you have undertaken a lawsuit, [then] you should not without good reason raise an action against me for the transfer of the suit into my name while the suit is in process; for you have not yet fulfilled the mandate. 2. Again, if while you are managing my affairs you make a promise to any of my creditors, it must be stated that you can raise an action, even before you make payment, requiring me to take on the obligation; or if the creditor objects to the transfer of the obligation, I must give you security that I will defend you. 3. If I promise your appearance in court and do not produce you, I can raise an action on mandate for you to release me from my obligation even before I make good my promise; or [similarly] if I have become on your account the

debtor in a stipulation. 4. But if I give you a mandate to pay my creditor and you assume the obligation to pay and on this ground you have judgment given against you, the more humane view is that in this event also an action on mandate is available to you. 5. But whenever we have said that an action on mandate can be raised before money has been paid, the principal debtor will be liable in an obligation requiring performance, not payment; and it is fair that just as if, after we have obtained [a right of] action on anyone's mandate, we are compelled by the action on mandate to hand it over, so, on the same grounds, when bound by an obligation, we have an action on mandate to be released. 6. If by expenses properly incurred a guarantor increases the sum for which he has given a verbal guarantee, the person on whose behalf he gave the verbal guarantee will [have to] pay the whole amount. 7. I have stipulated from your debtor [to pay me] what you were owing to me at your risk; Nerva and Atilicinus state that I can raise an action on mandate against you for the amount by which what I can recover from him falls short, even though that mandate relates to your affairs. And rightly so; for he who appoints a debtor in his stead by *delegatio* is released [only] if the creditor accepts him as the [new] debtor, not when he stipulates from him at the debtor's risk. 8. The legal principle is the same if I should have raised an action against the principal debtor on the mandate of the guarantor, because of my obeying the mandate, he would be freed from the earlier ground of action.

46 PAUL, *Edict, book 74:* If someone gives a *sponsio* [as surety] for another who made a promise in these terms: "If you do not hand over Stichus, will you give [me] one hundred thousand?" And he buys Stichus at a lower price and hands him over so that the stipulation of one hundred thousand may not be incurred, it is agreed that he can raise an action on mandate. It is therefore most convenient to observe this practice in mandates that as long as the mandate is for something definite, there should be no departure from its scope; but whenever [it is] indefinite or [deals with] more than one matter, then, even though the terms of the mandate were discharged by acts other than those included in the mandate itself, yet provided that this was in the mandator's interest, there will be an action on mandate.

47 POMPONIUS, *From Plautius, book 3:* Julian says that if his [future] wife promises her guarantor by way of dowry what she owes him by reason of his verbal guarantee, [then] on their subsequent marriage, he can immediately raise an action on mandate against the debtor, because it is understood that he has paid out money in that he is bearing the burdens of the marriage. 1. If a person who has given a verbal guarantee on your behalf for the conveyance of a slave gives the stipulator someone else's slave, he is not released from his obligation, nor does he release you [from yours], and accordingly he cannot bring an action on mandate against you. But if the stipulator usucapts that slave, then it must be held, Julian says, that release occurs. In that event, therefore, there will be an action on mandate against you, but only after the usucaption.

48 CELSUS, *Digest, book 7:* Quintus Mucius Scaevola states that if anyone had given a verbal guarantee for money lent at interest and when the debtor, having been sued in court, sought to plead that the money was not lent at interest and the guarantor, by paying the interest, had deprived the debtor of his power of denying that the interest [was due, the guarantor] should not [have the right to] sue the debtor for that money. But if the debtor had instructed the guarantor that the latter should plead a defense that the money was not lent at interest and he, for the sake of his own reputation, had not been willing so to plead, then he will [have a right to] sue the debtor for what he paid in this way. Scaevola's opinion on this is sound; for in the first case, the guarantor is acting with insufficient regard to his duty in that he seems to be taking away from the debtor the power to exercise his right; but in the second case, the guarantor ought not to suffer for having heeded his conscience. 1. When I give you a mandate to man-

age my affairs by lending money and to hand over that debt to me [on terms that] the risk and the profit in the matter are mine, I think that the mandate can stand. 2. But [if I give you a mandate] to manage your own affairs, [so] that the loan is at your discretion (that is, you may lend to whom you like) and you receive the interest and only the risk falls on me, [the contract] is now outside the scope of a mandate, just as if I were to give you a mandate to buy yourself any farm you like.

49 MARCELLUS, *Digest, book 6:* I have in good faith bought Titius's slave from someone else and possess him; Titius sold him on my mandate, not knowing him to be his own; or, on the other hand, I sold him on [Titius's] mandate and by chance he to whom [Titius] becomes heir had bought him. What is the position regarding the right of eviction and the mandate? My view is that Titius, although he sold [the slave] as if he were a procurator, is under an obligation to the buyer and that if he had handed the property over, he should not be allowed a *vindicatio*. Accordingly, he is not liable on mandate, but, on the other hand, he can raise an action on mandate if he should have had an interest, perhaps because he was not going to sell [the slave]. The mandator, on the other hand, if he wishes to claim the property from him, is met by a defense of fraud, but he has by right of inheritance the testator's action on sale against the seller.

50 CELSUS, *Digest, book 38:* If a person who was managing the affairs of a verbal guarantor paid the stipulator with the result that he released both the principal debtor and the guarantor and did so competently, he makes the guarantor liable to an action for unsolicited administration; nor does it make any difference whether the guarantor gave his approval or not. But the guarantor, even before he pays the money to his procurator, would have an action on mandate as soon as he had given approval. 1. If, when grain was due [under mandate], the guarantor provided it from Africa; or if, under pressure to perform the obligation, he laid out something more than the value of the thing handed over; or if he handed over Stichus and the latter died or was reduced to worthlessness by sickness or criminal act, he would recover by an action on mandate.

51 JAVOLENUS, *From Cassius, book 9:* A verbal guarantor, even if it was by mistake that he paid the money before the due date, cannot sue for its return from the principal debtor, nor does he even have an action on mandate against him before the due date of payment arrives.

52 JAVOLENUS, *Letters, book 1:* I think that a verbal guarantor, if he pledged himself to provide wheat on someone else's behalf with no term added as to the quality of the wheat, can release the debtor by handing over any quality of wheat; but he cannot sue the debtor for any other wheat than the lowest quality with which he lawfully released himself from his obligations to the stipulator. Therefore, if the debtor is ready to give the guarantor that which, if he gave it himself to his creditor, could have released him, and the guarantor sues for that which he handed over, that is, wheat of better quality, I think he can be met by the defense of fraud.

53 PAPINIAN, *Questions, book 9:* A person who has given a verbal guarantee on behalf of another, in his presence and without his dissenting, on the word of a third party,

holds both of them under an obligation by right of mandate; but if he gave the verbal guarantee on behalf of an unwilling or ignorant [debtor] in pursuance of a mandate from the other of the two, he can sue only the person who gave the mandate, not the debtor under the stipulation as well; nor does the fact that the debtor is released by the money of the guarantor affect my view; for the same applies if you pay on my mandate on behalf of someone else.

54 PAPINIAN, *Questions, book 27:* When a slave gives a mandate to a third party to buy him, the mandate is of no effect. But if the mandate was for the purpose that the slave should be manumitted and [the buyer] does not manumit, the master will recover the price, as seller, and there will be an action on mandate by reason of affection; suppose that it is his natural son or his brother (for the jurists have agreed that account is to be taken of affection in actions of good faith). But if the buyer paid the price with his own money (for he cannot otherwise be released from an action by the seller), the question is frequently asked: Can he effectively bring an action [on mandate] on the *peculium*? It appears both more correct and more expedient [to say] that the praetor had not contemplated contracts of this kind by slaves by which they might take themselves away from their masters without good cause. 1. If a freeman serving in good faith gives a mandate for his redemption and [the purchase] is made with the buyer's [own] money, it is agreed that a counteraction on mandate can be raised to the effect that only the actions which the buyer has against the seller may be assigned; suppose that the buyer had not manumitted someone [actually] free.

55 PAPINIAN, *Replies, book 1:* A procurator who has not taken away things that were locked up but has failed to hand back things delivered to him is liable to an action on mandate, not for theft.

56 PAPINIAN, *Replies, book 3:* A person who has given a mandate for the granting of money as a loan for consumption can be chosen [to be sued] to the exclusion of the debtor who made the promise, [although] pledges have not been sold off. And if it has been expressly stated in a [contractual] document that he may do this [sue the mandator before suing the debtor or selling pledges], the creditor can return to [the mandator] even after the pledges have been sold off; for terms inserted into a contract for the removal of doubt do not prejudice the general law. 1. A verbal guarantor who has paid money into court and, because of the youth of the plaintiff, has sealed it and put it on public deposit can forthwith raise an action on mandate. 2. The fact that a master, having returned from a province after five years and being shortly about to set out again on state business, renews his mandate without accounts being rendered does not mean that [his procurator's] good faith should not be investigated for the whole period. Since, therefore, it is part of the duty of a procurator to transfer to the second [set of] accounts whatever he owed from the first [period of] administration of [his principal's] affairs, he will be sued in respect of the first by reason of the second period. 3. A salary depending on an indefinite unilateral promise is not properly sued for either *extra ordinem* or by an action on mandate to establish a salary for you. 4. Even if the procurator has not been able to bring the business to a conclusion, necessary expenses incurred in good faith must be reimbursed in an action on mandate.

57 PAPINIAN, *Replies, book 10:* It was established that a mandate to sell off slaves had lapsed with the death of the person who undertook the mandate. However, because his heirs had fallen into error and, with the intention not of theft but of carrying out the duty which the deceased had assumed, had sold the slaves, it was agreed that those [slaves] appeared to have been usucapted by their buyers. [It was also agreed,] however, that the slave-dealer on his return from the province would have a competent *actio Publiciana*, since the defense of ownership is [only] granted after investigation of the facts and it is not right for someone who chose a particular man for his trustworthiness to suffer loss because of the mistake or inexperience of his heirs.

58 PAUL, *Questions, book 4:* If, after a mandate was given, you had defended [an action on behalf of] Titius although he had died (a fact of which you were unaware), I think that you have a competent action on mandate against Titius's heir, because the man-

date is dissolved by the death of the mandator, but not the action on mandate as well. But if you undertook the defense without a mandate, you had begun as it were to manage the affairs of the deceased, and then, just as you would have a competent action for unsolicited administration if you had released him [from his obligation], so it can be said that his heir is also liable to the same action. 1. Lucius Titius gave his own creditor a mandator [a guarantor by mandate]; then, on the death of the debtor and with the consent of the majority of his creditors, [but] in the absence of that creditor for whom there had been a mandator, it was decreed by the praetor that the creditors should take a share from the heirs. If the mandator should be sued, would he have the same defense as an heir of the debtor? I gave the opinion that if [the remaining creditor] had been present before the praetor and had given his consent, he appeared to have made a pact on a lawful basis and that that defense ought to have been granted both to a verbal guarantor and to the mandator. But since you posit that he was not present, it is unjust that he should be deprived of his choice (as if it were a pledge or *privilegium*) when, if he had been present, he could have made that decision openly and not sought the praetor's decree; nor if someone holds that the creditor should be barred, is regard paid to the interest of the heir but to that of the mandator or the verbal guarantor to whom he will [have to] make over the same share by an action on mandate? Certainly, should he have accepted a share from the heir, there has been doubt over whether the creditor should be allowed to sue a verbal guarantor for the rest; but by suing the heir he will be regarded as accepting the decree [of the praetor].

59 PAUL, *Replies, book 4:* Should Calpurnius, on Titius's mandate, have stipulated for money which Titius was lending with no intention of making a gift, [it is agreed that] he can be sued by Titius's heir in an action on mandate to oblige him to assign his actions; and the position is the same if the money was exacted by Calpurnius. 1. Paul gave the opinion that a verbal guarantor, who bought from the creditor an article subject to a right of pledge, [if] he is sued in an action on mandate by the debtor's heir, who has offered to repay all that is owed, must be compelled to restore it along with the fruits; nor ought he to be regarded as in the same position as a third-party buyer, since he must show good faith in the whole contract. 2. Paul gave the opinion that the insertion in a mandate of a date within which Lucius Titius wrote that he would fulfill his promise is not a bar to his being sued in an action on mandate even after that date. 3. Paul gave the opinion that one of [several] mandators could be chosen [as liable] for the whole, even if this was not [specifically] agreed in the mandate; however, after judgment had been given against the persons of two [mandators], it followed by reason of the judgment delivered that each could and should be sued for a half share. 4. A creditor sold a pledge. If the buyer has been evicted from possession, can the creditor have recourse to the mandator? And does it make any difference whether he sells by the right of a creditor or promises it under the general law? Paul gave the opinion that if the creditor has failed to recover the [whole] debt from the sale price of the pledges, the mandator does not seem to be released. It is clear from this opinion that if he is not liable on account of the eviction, the article [sold off] can serve to release him. 5. "'A' to 'B,' greetings. I charge you to lend my relation Blaesius Severus eighty under such-and-such pledges; for which money, and anything which is added under the heading of interest, I shall be surety that your account is secure from loss by reason of the mandate for so long as Blaesius Severus shall live." Subsequently, after being repeatedly summoned, the mandator failed to give a reply. Has he been released by the death of the debtor? Paul gave the opinion that the obligation of the mandate was perpetual, even though there may appear to be added in the mandate: "I shall be surety that your account is secure from loss for so long as Blaesius Severus shall live." 6. Paul gave the opinion that there did not appear to have been compliance with the terms of a mandate if, when it was [specifically] added in the mandate that suitable security should be demanded of the debtor, neither a verbal guarantor nor pledges were taken.

60 SCAEVOLA, *Replies, book 1:* A creditor has sued his mandator [guarantor by mandate]; the latter, having lost the action, has appealed. Can the debtor be sued by the creditor while the appeal is pending? I gave the opinion that he can. 1. [Someone] sent a letter to a man about to marry a wife in such terms as these: "Titius to Seius, greetings. You know that Sempronia is dear to my heart; and, therefore, since it is at my desire that she is to marry you, I should like you to be assured that you are contracting a marriage worthy of your standing. Although I know that Titia, the girl's mother, will give you suitable assurances of a dowry, yet I have no hesitation in making a promise of my own, so that I may secure your closer friendship with my house. For this reason you should know that for whatever you stipulate for from her, on that account I have guaranteed that you shall be safeguarded." And so Titia, who had neither given a mandate to Titius nor confirmed what he had written, promised a dowry to Seius. If Titius's heir pays up on the basis of a mandate, can he sue Titia's heir by means of an action on mandate? I gave the opinion that on the facts as stated he cannot. Can he not then [raise an action] for unsolicited administration? I gave the opinion that on this head too he cannot lawfully raise an action; for [it is] clear that in this matter Titius gave his mandate not so much on Titia's behalf as because he wished regard to be had to the girl's interests. Again, should the husband raise an action against the mandator, may he be barred by any defense? I gave the opinion that no reason had been put forward why he should be barred. 2. Someone gave a mandate for the administration of [his] affairs to two persons; can each of them be liable in an action on mandate for the whole? I gave the opinion that each should be sued for the whole, provided that what was obtained from both did not exceed the [total] amount owing. 3. If it has been arranged, or tacitly understood between a husband and his father-in-law that the burden of supporting the wife should return to the husband if her father paid interest on the dowry, [I gave the opinion] that no ground of action survives for the recovery of what is said not to have been consumed; but if the father shows that he has given a mandate for the girl's support, an action on mandate is competent. 4. Lucius Titius entrusted the management of his affairs to his brother's son as follows: "To Seius the son, greetings. I consider it natural that a son should undertake business on behalf of his father and of those connected with his father without anyone asking for his authorization. But if there is a need for something of the kind [that is, such authorization], I entrust you with the management of all that is mine to deal with as you see fit, whether you wish to sell, to pledge, to buy or to do any [other] thing, as master of my affairs. All that is done by you will be regarded as authorized by me, and I shall not countermand you in any matter." If [Seius] should have alienated or mandated anything fraudulently and not with the intention of [honest] administration, would it hold good? I gave the opinion that the person who was the subject of the inquiry had indeed given the mandate in very broad terms, but within [the assumption] that his affairs should be managed in good faith. Again, when Seius, after undertaking the duty of a magistracy, had fallen into debt, could Lucius Titius be sued on that account, or his property made subject to a pledge because of the words of the letter quoted above? I gave the opinion that he could not be sued and that his property was not subject to pledge.

61 PAUL, *Neratius, book 2:* I gave a mandate to a son-in-power to sue for something which he collected after he had been emancipated. I shall have an effective action on the *peculium* within one year. PAUL: But there is also a right of action against the son [himself].

62 SCAEVOLA, *Digest, book 6:* When there was a dispute about the inheritance of a dead woman between the appointed heir and her paternal uncle, Maevius, together with her paternal aunts, Maevius, in a letter written to his sisters, declared that what-

ever should come to him as a result of the suit on the inheritance should be their common property, but no stipulation followed the letter. When the same Maevius made a *transactio* with the appointed heir to the effect that the lands and certain other property should come to him from this *transactio*, could he be sued by his sisters on the basis of his letter? The opinion was given that he could. 1. I gave a mandate in these words: "Lucius Titius to his friend Gaius, greetings. I ask and I charge you that you should stand surety for Publius Maevius with Sempronius; and I make known to you, in this letter written in my own hand, that whatever is not paid you by Publius I shall pay in cash." If he had not given a verbal guarantee but had given a mandate to the creditor, and [the mandatary] had acted otherwise than the mandate had authorized him, would he be liable to the action on mandate? The opinion was given that he would be liable.

2

PARTNERSHIP

1 PAUL, *Edict, book 32:* A partnership can be formed either for all time, that is, as long as the contracting partners live or for a limited period of time or from a particular moment in time or under a condition. 1. In a partnership in all goods, all that belongs to those entering into partnership is held in common forthwith,

2 GAIUS, *Provincial Edict, book 10:* because, although no handover of goods actually occurs, it is tacitly understood to occur.

3 PAUL, *Edict, book 32:* However, such assets as are in the form of debts remain in the same condition. But the parties are mutually bound to assign their rights of action. 1. Whenever a partnership specifically in all goods is formed, then inheritance and legacy and whatever is given or acquired in any way is acquired for the common stock. 2. Suppose a partnership has been formed on the terms that whatever legitimate inheritance should fall to one partner should be held in common. The question arises as to what is a legitimate inheritance. Is it one that comes by the authority of law, or does it also cover one that comes by will? The better supposition is that it applies only to an inheritance that falls under the law. 3. If a partnership has been formed with malicious intent or to perpetrate fraud, it is quite simply null and void, because good faith is incompatible with fraud and deceit.

4 MODESTINUS, *Rules, book 3:* It is not in doubt that a partnership can be formed by act, by words, or through a messenger. 1. It is dissolved through renunciation, death, change of civil status, and poverty.

5 ULPIAN, *Edict, book 31:* Partnerships are formed in all goods, or in some business, or for the collection of a tax, or even in one thing. 1. Moreover, a partnership may be formed with validity even between people of unequal wealth, since the poorer man makes up in services what he lacks in material resources by comparison with the other. Partnership cannot properly be contracted for the purpose of making a gift.

6 POMPONIUS, *Sabinus, book 9:* If you enter a partnership with me on the terms that you are to determine our respective shares in the partnership, then the matter must be referred to a good man for decision. And it is appropriate for a good man to decide that we should definitely not be partners in equal shares, for example, where one of us is to contribute more to the partnership in the way of services or hard work or money.

7 ULPIAN, *Sabinus, book 30:* It is also permissible to form a partnership without specific terms; and if no terms have been specified, the partnership is held to be formed in all that comes in the way of profit, that is, in whatever return comes from purchase and sale, letting and hiring.

8 PAUL, *Sabinus, book 6:* Profit is to be understood as that which comes from the efforts of a partner.

9 ULPIAN, *Sabinus, book 30:* Sabinus does not add inheritance or legacy or gifts, whether *mortis causa* or not. Perhaps the explanation is that the profit does not come without any reason, but because it has been earned in some way,

10 PAUL, *Sabinus, book 6:* and because very often inheritance comes to us from a parent or a freedman almost as if a debt were being repaid.

11 ULPIAN, *Sabinus, book 30:* And Quintus Mucius writes in the same vein concerning inheritance, legacy, and gift.

12 PAUL, *Sabinus, book 6:* However, debt will not have to be registered in the accounts of the partnership, unless it derives from profit.

13 PAUL, *Edict, book 32:* Even if the terms state that the partners are to share earnings and profit, this clause is nevertheless relevant only to the profit that comes from earnings.

14 ULPIAN, *Sabinus, book 30:* If it is decided between the partners that goods held in common should not be divided up within an agreed period of time, this cannot be interpreted as an agreement not to dissolve the partnership. But if an agreement against dissolution is made, does it have validity? Pomponius, in a neat answer, says that such an agreement is null and void, adding that even in the absence of such a clause, if the partnership is renounced at an inopportune moment, an action on partnership is available. If, however, there is a clause against the withdrawal within an agreed period of time and the partnership is renounced before the expiration of that period, the renunciation may have reasonable cause. A partner will not be subject to an action on partnership if he renounced the partnership specifically because a particular term on the basis of which the partnership was formed was not fulfilled. Again, what of a case where a partner's behavior is so damaging and harmful that it is not worth putting up with him?

15 POMPONIUS, *Sabinus, book 13:* Or where a partner is not permitted the enjoyment of the very thing for the sake of which an enterprise was undertaken?

16 ULPIAN, *Sabinus, book 30:* It is the same where a partner renounces a partnership to go away on state business for a considerable period of time against his will. Certainly, it may sometimes be objected that he could manage the partnership through another man or entrust it to a co-partner. But this would not be appropriate unless the partner concerned is particularly reliable or unless the management of the partnership in the absence of one of the partners should prove straightforward even if put in another's hands. 1. A partner who agrees not to divide into shares cannot sell his share, unless there is some reasonable justification; otherwise, he might bring about a division in another way. Clearly, however, it is possible to say that it is not that a sale is impeded, but that the purchaser might be confronted with a defense, if a division were to be made before the vendor proceeded to a division.

17 PAUL, *Sabinus, book 6:* Moreover, a partner who sells property against the terms of the contract incurs liability for this, and may be sued either by an action on partnership or by an action for dividing common property. 1. If one partner renounces the partnership while the other is absent, until such time as the absent partner is apprised of the fact, any gains by the renouncing partner are shared, but any losses are for the

latter alone to bear. On the other hand, whatever the absent partner has gained goes to him alone, whereas any loss incurred by him is shared. 2. There is no need when a partnership is being formed to include a warning concerning renunciation, since, by the rules governing partnership themselves, a renunciation which is inopportune comes into the final assessment.

18 POMPONIUS, *Sabinus, book 13:* If a slave has entered a partnership, it will not be enough for the slave to be ordered by his master to withdraw from the partnership; a renunciation must be made to the co-partner.

19 ULPIAN, *Sabinus, book 30:* A man admitted to a partnership is partner only to the man who admitted him. This is as it should be; for, since partnership is entered into by agreement, no one can be my partner whom I did not wish to be. If, therefore, my partner admits him, he is his partner alone.

20 ULPIAN, *Edict, book 31:* (For my partner's partner is not my partner.)

21 ULPIAN, *Sabinus, book 30:* And whatever he has gained from our partnership he will share with the partner who admitted him—we will not share our gains with him. But he will be liable to the partnership for his activities. That is to say, the partner who admitted him will sue and will himself be liable to the partnership for whatever he obtains.

22 GAIUS, *Provincial Edict, book 10:* On the other hand, the admitting partner must be liable to his partner for the activities of the partners as if they were his own, because he has an action against them. Again, it is indisputable that nothing stands in the way of an action for partnership proceeding between the admitting partner and the man he has admitted, before one commences between the admitting partner and the other partners.

23 ULPIAN, *Sabinus, book 30:* Pomponius is undecided on this point: is it enough for the admitting partner to commit his rights of action to the charge of his partners, so that if he cannot act, he will owe no further liability to them, or must he guarantee them security from loss? My judgment is that he is wholly liable for the person whom he himself admitted on his own responsibility—it would be hard to deny that he, if anyone, was to blame for admitting him. 1. Pomponius also asks whether any advantage accruing from the admission of a partner ought to be set off against any loss which he caused through negligence. His answer is that it ought. But this is not right; for according to Marcellus in the sixth book of his *Digest*, if the slave of one of the partners has been set over the partnership business by his master and has performed negligently, the master who placed him in this position will be liable, and any advantage that comes to the partnership through the slave's services is not to be set off against any loss. The deified Marcus, he says, issued this judgment; and he adds that you cannot say to a partner: "If you seek compensation for loss, you must keep your hands off any profit coming in through the slave."

24 ULPIAN, *Edict, book 31:* Plainly, if both partners have set the slave of one of them over the partnership, the slave's master will not be liable on his behalf, except up to the amount of the *peculium*. It is right that they should share the risk where they both appoint him together.

25 PAUL, *Sabinus, book 6:* Where the partnership has been ruined by the negligence of a partner, the risk that he bears is not reduced by the fact that in many other operations the partnership has prospered as a result of his hard work. This was the emperor's verdict on appeal.

26 ULPIAN, *Edict, book 31:* Therefore, if a partner has acted negligently in certain partnership enterprises while having advanced the partnership in many others, the gain cannot be set off against the negligence; so Marcellus writes in the sixth book of his *Digest*.

27 PAUL, *Sabinus, book 6:* Any debt contracted during the existence of a partnership is

to be met out of the common property, even if the payment is to be made after the partnership has been dissolved. Therefore, even if the debtor had promised subject to a particular term, and the term was fulfilled after the dissolution of the partnership, payment must be made out of the common funds. Thus, if in the meantime the partnership is liquidated, *cautiones* must be provided.

28 PAUL, *Edict, book 60:* We are partners, and one of us owes money payable on a given day. The partnership is dissolved. The debtor cannot subtract the debt in the way that he can when it is payable immediately and without condition. But all must take their shares and give guarantees that the partner will be defended when the day comes.

29 ULPIAN, *Sabinus, book 30:* If shares in a partnership have been left unspecified, it is agreed that they are to be equal. If, however, it has been decided that one man should have two or three shares and another one share, can this be accepted as valid? It is regarded as valid, provided that the former has made a more substantial contribution to the partnership in money or services or anything else. 1. It is Cassius's opinion that a partnership can be formed on the terms that one partner is to suffer no part of any loss whereas profits are to be shared. An agreement of this kind will indeed be valid, in the view of Sabinus, if services are rendered commensurate with the loss incurred. Very often a partner works so hard for the partnership that his contribution is worth more to it than money, for example, if he were to be the only partner to travel by sea or go abroad at all or expose himself to such dangers. 2. Aristo tells us that Cassius gave the following response: No partnership may be contracted in which profit goes exclusively to one partner and loss to the other. He used to call this partnership leonine. We agree that a partnership is no partnership at all, where one man takes the profit and the other none, while bearing the loss. It is the least equitable kind of partnership, wherein a partner can suffer loss but see none of the profits.

30 PAUL, *Sabinus, book 6:* Mucius writes in his fourteenth book that it is impossible to form a partnership in which a partner is to get one share of any loss and a different share of any profit. Servius in his *Notes to Mucius* agrees that such a partnership cannot be formed and explains that profit can only be understood as what is left once all loss has been deducted, and loss as the residue once all profit has been deducted. On the other hand, it is possible to form a partnership on the terms that a partner should take one share of such profit as is left in the partnership once all loss has been deducted, and another share of such loss as is left in similar fashion.

31 ULPIAN, *Sabinus, book 30:* For there to be an action on partnership there must be a partnership: it is not enough that there are goods held in common, unless a partnership exists. Goods can be treated as held in common also outside a partnership, as, for example, when we come to share ownership without having any inclination to form a partnership. This occurs when goods are bequeathed as a legacy to two people or if goods are purchased by two people acting together or if an inheritance or gift comes to us jointly or if we independently purchase from two people their respective shares in a partnership without ourselves having any intention to form a partnership.

32 ULPIAN, *Edict, book 2:* Where a partnership has been formed after deliberation, an action on partnership is available; where, on the other hand, people have become associated without deliberation in the course of things and out of the business itself, then this is to be seen as a case of management in common,

33 ULPIAN, *Edict, book 31:* as in bidding for public contracts or in sales. People who do not want to compete with each other are accustomed to purchase goods through a messenger to hold in common. But this is a far cry from partnership. Thus, while a *pupillus* who has formed a partnership without the authority of his tutor is not liable, he is liable in a case of management in common.

34 GAIUS, *Provincial Edict, book 10:* In such cases, if one man happens to have made investments in the goods or has received gains and profits or done damage to the goods, there is no place for an action of partnership, but the proper action is the action for dividing an inheritance, if the parties are co-heirs, and the action for dividing common property otherwise. Also in the case of those who hold property in common by law of inheritance, an action for dividing common property is available in addition.

35 ULPIAN, *Sabinus, book 30:* No one can line up his heir for a partnership in such a way that the heir becomes a partner. However, an action can be had against a partner's heir to induce him to show good faith.

36 PAUL, *Sabinus, book 6:* And he is liable for negligence in his acts in the same way as the person whom he succeeded would be, although he is not a partner.

37 POMPONIUS, *Sabinus, book 13:* Clearly, if those who have become heirs to partners have the intention of forming a partnership in respect of their inheritances, there is a new consensus with the result that they become liable to an action on partnership with regard to their subsequent activities.

38 PAUL, *Sabinus, book 6:* A judge in partnership actions should, by taking *cautiones*, provide for future loss or gain that might arise out of that partnership. Sabinus held this to be desirable in all actions of good faith, general (like the actions on partnership, for unauthorized administration, on tutelage) or special (like the actions on mandate, loan for use, deposit). 1. If we are partners and the property held in connection with the partnership is held in common, any investment I make with respect to that property, and any profit you take from it, can be recovered by me through an action on partnership or an action for dividing common property; and one action excludes the other. So Proculus says.

39 POMPONIUS, *Sabinus, book 13:* If we own a farm between us and you bury a dead body on it, I can bring an action on partnership against you.

40 POMPONIUS, *Sabinus, book 17:* Although the heir of a partner is not a partner, he ought to complete such business as was begun by the dead man. Any fraud of the dead partner in these matters can be brought into consideration.

41 ULPIAN, *Edict, book 20:* A man who stipulated with his partner for a penalty cannot proceed against him by an action on partnership, if the sum set for the penalty amounts to his interest in the matter.

42 ULPIAN, *Sabinus, book 45:* But if he obtains the penalty by an action on stipulation, he will gain that much less in any subsequent partnership action, the penalty being reckoned as a charge against the capital.

43 ULPIAN, *Edict, book 28:* If an action for the division of common property has been brought, this does not rule out an action on partnership, since the latter action takes account of contractual debts and does not allow assignment of property by judgment. But if an action on partnership is subsequently brought, the amount the plaintiff stands to gain by that action is reduced by the amount he gained by the earlier action.

44 ULPIAN, *Edict, book 31:* If I give you pearls to sell on the terms that if you sell them for ten, you give me the ten, and if for more than ten you keep the excess, in my judg-

ment, if this was done with the intention of forming a partnership, an action on partnership is available, but if not, an action *praescriptis verbis.*

45 ULPIAN, *Sabinus, book 30:* A partner may be sued for theft in respect of common property, if he took something away by fraud or deceit, or if he handles common property with intent to conceal it. But he is also liable to an action on partnership, and the one action does not exclude the other. The same rule applies in all actions of good faith.

46 PAUL, *Sabinus, book 6:* The rule also applies in the cases of a tenant farmer, a business agent, one who carries out a mandate, and a tutor.

47 ULPIAN, *Sabinus, book 30:* But if I bring a *condictio* for theft, I will lose my right to an action on partnership, unless I value it more than the other. 1. If a partner damages common property, he is liable to the Aquilan action, as Celsus, Julian, and Pomponius all say.

48 PAUL, *Sabinus, book 6:* But he is nonetheless liable to an action on partnership also,

49 ULPIAN, *Edict, book 31:* if what he has done has harmed the partnership, if, for example, he has wounded or killed a slave who was employed on partnership business.

50 PAUL, *Sabinus, book 6:* But the result of the action on partnership is that he will have to be content with the other action, since both actions look to compensation, not merely to a penalty, as is the case with the action for theft.

51 ULPIAN, *Sabinus, book 30:* It was right to stipulate that there was an action for theft only in the case of the removal of goods by fraud or deceit, because if this is done without deceit, the action for theft does not apply. And obviously, it is on the whole a fair assumption that the owner of a share is making use of the thing by his own right rather than with intent to steal. 1. Therefore, we may pose the question whether he is liable under the Fabian law. In principle he should not be liable. But if he was guilty of kidnapping or concealing, he is liable under the Fabian law.

52 ULPIAN, *Edict, book 31:* A farm adjoining two others came up for sale. The owner of one of the two adjoining properties asked the other to buy the farm, but to make over to him that part which was adjacent to his own farm. Soon afterward he bought the farm himself without informing his neighbor. Does the neighbor have an action against him? Julian says a question of fact is involved. For if the intention was merely that the neighbor buy the farm of Lucius Titius and share it with me, he has no action against me if I buy the farm. If, on the other hand, the intention was to proceed as if we had a joint interest, then I will be liable, under the partnership action, to force me to hand over to you the shares remaining after that part which was the subject of my mandate has been deducted. 1. Good faith comes into the reckoning in this action on partnership. 2. Should a partner be liable only for fraud or also for negligence? According to Celsus in the seventh book of his *Digest*, partners must answer to one another for fraud and negligence. If, he says, at the formation of the partnership one partner promises to contribute his expertise or his services, as when herd animals are to be grazed for their mutual benefit or arable land is entrusted to a cultivator for the raising of crops, again for the benefit of both partners, then in such cases one is presumably liable for negligence also. For the reward for effort is the concealment of skill. But Celsus is more prepared to admit that negligence comes into consideration as well where a partner damages goods held in common. 3. Partners cannot be compelled to assume liability for losses which they could not have anticipated, that is, unavoidable losses. Therefore, if herd animals subjected to prior valuation have been entrusted to

a partner and are lost through brigandage or fire, the loss is shared, provided that there was no fraud or negligence on the part of the partner who received the herd animals so assessed. If, on the other hand, the herd animals were stolen by thieves, the loss is borne by the man who received the assessed herd animals, because he should have provided for their security. This is all true, and an action on partnership will be available, provided that the cattle although assessed were handed over to be pastured on account of a contract of partnership. 4. Some men established a cloak-making business. One of them set out to purchase goods but fell upon robbers and lost his money. His slaves were wounded, and he also lost some items that were his own. Julian says that the loss is shared and that therefore the other partner ought to submit in an action on partnership to half the loss, both in money and in the other items of property which he would not have taken with him, if he had not set out to make purchases on their joint behalf. Indeed, Julian quite rightly supports the view that the other partner should also acknowledge responsibility for a proportion of such medical expenses as were incurred. Moreover, if something was lost in a shipwreck, both should bear loss, when no other wares were on board than those usually carried on the boat; for just as profit should be shared, so too should loss, so long as it is not incurred as a result of a partner's negligence. 5. Two bankers were partners. One of them carried on a business on his own account and realized profit. The question was asked whether the profit should be shared. The Emperor Severus sent the following ruling to Flavius Felix: "Even if a partnership has been formed specifically for a banking business, it is established law that whatever each partner has gained from an enterprise unconnected with banking need not be made over to the common stock." 6. Also Papinian, in the third book of his *Replies*, says: "If brothers have kept their family inheritance undivided so that they could share the profit and loss coming from it, any gain they happen to have made from some other source need not be brought into the common stock." 7. Again, in the third book of his *Replies*, he cites a reply he gave in a case in which he was consulted. Flavius Victor and Bellicus Asianus had agreed that monuments should be erected with the exertions and skill of Asianus on land purchased with Victor's money. They would then be sold. Victor would recover his money with the addition of an agreed sum, and Asianus would get the rest in recognition of the hard work he had put into the partnership. Papinian's ruling was that there is a right of action on partnership here. 8. Papinian, in the same book, says that if two brothers have voluntarily formed a partnership, even military pay in addition to the other allowances can be made over to the common stock by a partnership action, although, as he goes on to say, an emancipated son is not compelled to contribute these for the benefit of a brother who is still under power. The reason is that even if he were still under power, he would have a special right to these. 9. Papinian gave a reply to the effect that partnership cannot be extended beyond the death of a partner and that for this reason a man cannot limit his freedom to dispose of his property in his last will, nor promote a more distant blood relation over those that are nearer. 10. Another reply of Papinian runs as follows: A partner restores parts of one or more apartment-blocks that need repair. He can either recover his principal with interest [at an agreed rate] in four months, after the work is completed, and make use of his preferential right to exact it, or he can take the property over forthwith as his own. Nevertheless, it is also open to him to proceed by an action on partnership to this end, to obtain what was due to him. He may, of course, choose to secure what is due to him rather than acquire ownership of an apartment-block. An oration of the deified Marcus sets four months as the limit for the agreed interest, precisely because ownership is given after four months. 11. If a partnership has been formed for the purpose of making a purchase and through the fraud or negligence of one of the partners no purchase is made, it is agreed that there is an action on partnership. Naturally, if the condition is added, "if the sale is made within a specified time," and the time goes by without negligence on the part of the partner, there will be no right of action on partnership. 12. Similarly, Cassius says that if expense has been incurred in keeping up a watercourse owned in common, then there is an action on partnership for recovering the outlay. 13. Again, Mela writes that if neighbors have made a space of half a foot for their joint use, with a view to putting up a wicker wall between their houses to carry the weights of both of them, and then, with the wall erected, one of them will not allow anything to be built into it, an action on partnership is available. In the same way, again according to Mela, where they buy a piece of ground for the common use to prevent obstruction of their light and it is made over to one of them and he does not make available to the

other what was agreed on, there is an action on partnership. 14. If several partnerships have been formed between the same people, it is agreed that this action is sufficient by itself for all the partnerships. 15. Where a partner has set out on a journey on partnership business, for example, to purchase goods, he can charge to the partnership only those expenses incurred to that end. Therefore, he is entitled to charge it with traveling expenses in connection with his own accommodation and the stabling of his horse, and the hire of pack animals and carts to carry himself, his luggage, and his goods. 16. Neratius says that a partner is obliged to make over all his goods to the partnership if he is a partner in all goods. Thus, he gave an opinion to the effect that the partner pay in anything he has received as compensation for injury or as damages under the *lex Aquilia*, whether the injury was done to his own person or to that of his son. 17. Neratius goes on to say that a partner in all goods is not compelled to make over whatever he has gained in unlawful ways. 18. On the other hand, the early lawyers also consider the question whether a partner in all goods, who has paid damages following condemnation in an action for injury, has the right to draw them from the common stock. Atilicinus, Sabinus, and Cassius all maintain that he does have this right if the condemnation is the result of misconduct on the part of the judge, but that if it follows from offenses that he has committed, then he must bear the whole loss himself. A judgment of Servius reported by Aufidius is relevant to this: In a partnership in [all] goods, where one partner loses a case because he was not present at court, he does not have the right to pay damages out of the common stock. If, on the other hand, he was present at court and was the victim of misconduct on the part of the judge, he can recoup from the common stock.

53 ULPIAN, *Sabinus, book 30:* Any profit won from theft or some other criminal offense obviously should not be paid into partnership funds, because mutual participation in crime is shameful and despicable. Of course, if such payments are made into the common fund, the profit will be shared.

54 POMPONIUS, *Sabinus, book 13:* If a partner has paid in the proceeds of crime, he can recover them only in the event of condemnation at court.

55 ULPIAN, *Sabinus, book 30:* If, therefore, a partner who has committed a criminal offense is taken to court for it, he can withdraw the money he paid in but no more than that, or that and the penalty. The former applies if the argument is that he paid the contribution into the partnership accounts without his partner's knowledge. But if the partner knew, he must submit to the penalty as well—it is only fair that if he shared his partner's gain he should also share his loss.

56 PAUL, *Sabinus, book 6:* It makes no difference whether the proceeds of theft have been handed over while the partnership was still in existence or after its dissolution. Moreover, this rule holds in regard to all actions involving shameful conduct, such as insult, robbery by violence, making a slave worse, and so on, and in regard to all pecuniary penalties arising out of criminal trials.

57 ULPIAN, *Sabinus, book 30:* But, as Pomponius says, we should not overlook the fact that this is only true if the partnership formed is in a reputable and legal business. If it is a partnership in crime, then it is agreed that it is no partnership at all. The general rule that has been handed down is that there is no such thing as a partnership in dishonorable practices.

58 ULPIAN, *Edict, book 31:* We should consider whether an action on partnership is available in the case where a person's contribution to a partnership is lost. Celsus, in the seventh book of his *Digest*, has this discussion in relation to a letter from Cornelius Felix: You had three horses and I one, and we formed a partnership on the terms that you would take my horse, sell the horses as a team of four, and give me a quarter of the proceeds. Then my horse dies before the sale. Celsus says that in his opinion the partnership no longer exists, and I am owed no part of the price received from the sale of your horses; for the partnership was made not to form but to sell a team of four. If,

however, it was specified that a team of four should be formed, that it should be owned in common, and that your share in it would be three quarters and mine one quarter, then we would certainly still be partners. 1. Celsus also discusses this question: If we had contributed funds for making a purchase, and the money I made over was lost, who should bear the loss? Celsus says that if the money was lost after it had been handed over, something which could not have happened unless a partnership had been formed, then both are to bear the loss. For example, money might have been lost in the course of a journey abroad undertaken for the purpose of purchasing goods. If, on the other hand, Celsus continues, it was lost before the contribution was handed over, although after it had been set aside for the purpose, then you will recover nothing on account of it, because it was not the partnership which suffered the loss. 2. A son enters a partnership and is subsequently emancipated by his father. There is a discussion in Julian as to whether the same partnership has survived or another one replaced it, assuming that there is still a partnership after the emancipation. Julian, in the fourteenth book of his *Digest*, says that it is still the same, continuous, partnership; for in these contracts one must look at the beginning. But, he adds, there are two actions by which one may proceed, one against the father and one against the son. The action against the father is for any debt for which repayment was due before the emancipation took place; the father is not liable for any debt that falls due in that period in the life of the partnership which follows the emancipation. The action against the son, however, applies to both periods, that is, to the whole life of the partnership. For according to Julian, if a partner of the son commits fraud after the son's emancipation, it is the son and not the father who has the right of action. 3. A slave of mine forms a partnership with Titius, is sold, and yet remains in the same partnership. It might be said that the original partnership had come to an end and another one started afresh with the sale of the slave and that, therefore, both I and the buyer have an action for partnership; that by the same token an action can be given against me as well as against the buyer in matters relating to the period before the sale, but otherwise against the buyer only.

59 POMPONIUS, *Sabinus, book 12:* So completely is the partnership dissolved by the death of a partner, that partners when they form the partnership cannot even agree that they can at death be replaced as partners by an heir. This is stated to be the rule in the case of private partnerships. But in partnerships formed for tax collection the partnership continues even after the death of a partner, provided that the share of the deceased has been assigned to the person of the heir, so that the partnership too must pass to him. One must judge this from the circumstances of the case. For the deceased may be the man chiefly responsible for forming the partnership or without whom the partnership cannot be run. 1. Any losses suffered by a partner in gambling or through adultery cannot be recovered out of the common fund. If, on the other hand, one partner suffers loss through fraud on the part of his co-partner, he may recover it from him.

60 POMPONIUS, *Sabinus, book 13:* According to Labeo, where a partner delays paying in profits made in the partnership business and spends the money on his own account, he is obliged to pay interest as well; not technically as interest but as compensation for the interest not received through delay. However, he held that where the partner did not spend the money or delay making it over, then this rule did not apply; that in addition, after the death of the partner, no such consideration was to be taken into account arising out of anything that the heir had done, because partnership is dissolved by the death of a partner. 1. A partner was wounded in trying to prevent slaves kept by the partnership for sale from breaking out and escaping. Labeo says he cannot get back through a partnership action the expenses he incurred in having himself treated, for the reason that the expenditure, though a consequence of partnership, was not made for partnership purposes. It is just as if someone, on account of his membership of a partnership, had failed to appoint him his heir or had passed him over as a receiver of a legacy or had administered his own property somewhat carelessly. Similarly, profit which might have come to him because of his position as a partner would not go into partnership funds, for example, if he had been appointed heir or had received a gift.

61 ULPIAN, *Edict, book 31:* But, according to Julian, he can even recover money paid to doctors on his own account; and this is sound.

62 POMPONIUS, *Sabinus, book 13:* Titius, my colleague in a partnership, dies. I, thinking that Titius's inheritance belongs to Seius, sell the property together with him. Some of the money produced by the sale I take, some is taken by Seius. You, the true heir of Titius, cannot, according to Neratius and Aristo, get back by a partnership action that portion of the money which came to me. The reason is that I received only the consideration for my share of the property, and it is immaterial whether I sold my own share by itself or jointly with the man who claimed ownership of the remaining portion. Otherwise, it would come about that each of two partners who have sold a property could be required by a partnership action to hand over to the other a share in what had come to him. But, they go on to say, you will not have to give me anything out of whatever share you recover from Seius, perhaps by a *petitio hereditatis*, because what comes to Seius is the consideration for your share; nor will any part of that be payable to me, as I have my own consideration.

63 ULPIAN, *Edict, book 31:* What Sabinus says is correct; even where a partnership is not in all goods but one matter, the partners nonetheless ought to be condemned for the amount they can pay or by fraudulent means brought about that they cannot pay. This is perfectly reasonable, since partnership implies, in a sense, a law of brotherhood. 1. Does the benefit of this rule apply to a partner's surety or only to him in person? The latter view is preferable. But if the surety has submitted to an action in the role of defendant on the partner's behalf, the rule will benefit him too. For Julian, in the fourteenth book of his *Digest*, says that someone who defends an action for a partner should be ordered to pay only as much as the partner can pay. The same should apply, he continues, in the case of someone standing defense for a patron and, in fact, in all cases where people are sued for as much as they can pay. 2. The defense in question, however, he says, should not be granted to the father or master of a partner, if the partnership was formed at his command, because it is not allowed to the heir or other successors of a partner. Nor is the benefit available to the heirs or successors of any of those who may be sued for what they can pay. 3. How can a partner's capacity to pay be assessed? One rule is that any debt he owes is to be included. This is the verdict of Marcellus in the seventh book of his *Digest*, unless, he goes on to say, the debt happens to arise out of the partnership business itself. 4. A further question: Does such an action entail the offering of security in the form of a simple promise for whatever the partner cannot pay? I am inclined to believe that this should be the rule. 5. There are three partners. One of them sues a co-partner and recovers his share in full. The third partner then sues the same partner, but cannot recover his share in full, because the full extent of the debt cannot be paid. Can the partner who has recovered less than is due to him sue his co-partner who has recovered in full, with a view to sharing, that is, equalizing, their portions? The argument would be that it would be unfair for one to draw less than another from the same partnership. The better view is that an equal division between them both can be secured by means of an action on partnership, and this is a fair judgment. 6. The time to investigate a partner's ability to pay is when judgment is given. 7. "What someone can pay" is to be taken to include anything he did fraudulently to prevent himself from paying; it is not fair that someone should gain relief by means of his own fraud. This rule should be applied in all other cases where people are sued for as much as they can pay. But where someone has ceased to be able to pay what he ought, and as a result of negligence on his part, not fraud, then the proper judgment is that he should not be ordered to pay in full. 8. An action on partnership is available against the heir of a partner also, even though the heir is not a partner. Although he is not a partner, he takes over a partner's profit. In the case of partnerships for the collection of taxes and other public enterprises, the same rule is observed, that the heir is not a partner unless he is actually admitted into partnership. Nevertheless, all the profit coming from the partnership belongs to him, and thus, in the same way, he must submit to any loss

that there happens to be, whether this falls in the lifetime of the partner in tax collecting or after his death. In a partnership negotiated by private contract these rules do not obtain. 9. If one of the masters of a slave held in common leaves the slave a legacy but not his liberty, then the legacy goes to the other partner. Can, however, an action on partnership force him to share the legacy with the heir of the deceased? According to Julian, Sextus Pomponius reports a reply given by Sabinus against a sharing of the legacy, and Julian says this opinion is defensible. The reason is that the legacy was not acquired as a result of common ownership, but in consequence of the partner's own share. It would not be right to share an acquisition made not on the ground of partnership but on the ground of his individual share. 10. A partnership is dissolved by changes in persons or things, by free choice, or through a legal action. So if either persons or things or the will or an action perish, then the partnership is considered dissolved. People perish through a change in civil status, maximum or medium, or by death. Things perish when nothing is left of them or they change their nature; you cannot be a partner in respect of something which no longer exists or which has been consecrated or confiscated. A partnership is dissolved by a free decision when it is renounced.

64 CALLISTRATUS, *Questions, book 1:* So, when partners begin to act separately and each to further his own business interests, there is no doubt that the legal relationship of partnership is dissolved.

65 PAUL, *Edict, book 32:* A partnership is dissolved by an action when the position of a partnership is altered by a stipulation or a judicial judgment. Proculus says that a partnership is *ipso facto* renounced when legal proceedings have been launched with a view to dissolving the partnership, and this is so whether the partnership was in all goods or in one thing. 1. Similarly, Labeo says that a partnership is dissolved when a partner's goods have been sold by his creditors. 2. Labeo also says that if a partnership is formed with a view to buying or hiring a particular thing, then any profit or loss occurring after the death of one of the partners is shared. 3. We said above that partnership is dissolved when it is agreed that it be discontinued, that is, when all partners are of this mind. But what if one partner renounces? Cassius writes that someone who renounces a partnership frees his co-partners in respect to his own actions, but does not free himself in respect of theirs. This is certainly the rule to comply with where the renunciation was made with fraudulent intent. An example would be if, after the formation of a partnership in all goods, one partner saw he was coming into an inheritance, and renounced for that reason. In such a case, if the inheritance brings him loss, this will be borne by the man who renounced, whereas he may be compelled by an action on partnership to share any profit. But anything acquired after renunciation of partnership will not have to be shared, because he did nothing fraudulent in respect of it. 4. Similarly, if we form a partnership to purchase something and you wish to make the purchase on your own account and renounce the partnership for the purpose of making the purchase yourself, you will be liable to the extent of my interest in the matter. If, on the other hand, you renounce because you do not approve of the purchase, you will not be liable, even if I made the purchase, because there was no fraud involved; this is Julian's view. 5. However, in Labeo's *Posthumous Works* we read that if one partner renounces the partnership at a time when it was important to his co-partner that the partnership be not dissolved, then he makes himself liable to an action on partnership. Suppose, for example, we form a partnership and buy slaves, and then you renounce at a time which is disadvantageous for selling slaves, you are liable to an action on partnership, because in this case you are altering my prospects for the worse. Proculus says that this is only true if it is not to the advantage of a partnership that it be broken up; for invariably it is the interest of the partner-

ship, not the private advantage of one of the partners, which is safeguarded. The rule is as outlined, always provided that nothing was agreed upon with respect to the matter in question when the partnership was formed. 6. Similarly, someone who forms a partnership for a specified period of time and renounces it before it has run its course, frees his co-partner. Thus, if any profit is made after the renunciation, he gets no share of it, whereas, if a loss is incurred, he will be liable for part of it, as before, unless the renunciation was the product of some necessity. But if the time is up, he is free to withdraw, because this can be done without malicious intent. 7. It is possible to renounce a partnership through the agency of another; thus it is laid lown that a procurator can renounce a partnership. Does the rule apply, however, to a procurator who is entrusted with the management of all property, or to one commissioned expressly for this particular act, or, indeed, can the renunciation be performed properly by both? This last is the sounder judgment, unless the principal specifically forbade the procurator to renounce. 8. Similarly, there is authority for the rule that my co-partner can serve a notice of renunciation to my procurator as well as to me. There is a note of Servius in Alfenus to this effect, that it is for the principal to decide, when his procurator has received a renunciation, whether he wishes to treat it as valid. Therefore, a person whose procurator received a notice of renunciation may be held to be freed from liability. Whether his co-partner who renounced the partnership to the procurator is also freed will rest with the principal of the procurator, just as we said earlier in speaking of the man who renounces his co-partner. 9. A partnership breaks up on the death of one partner, even though it was formed by the agreement of all, and even if there are several partners still surviving, unless other terms were agreed upon when the partnership was formed. The heir of a partner does not succeed; but if any gain comes subsequently from the use of partnership funds, or if any fraud or negligence was involved in any business hanging over from the time previous to the death, then the heir can lodge a claim and must meet a claim, in the respective cases. 10. In addition, a partnership is terminated where it is for some purpose and the matter comes to an end. If, on the other hand, one partner dies before anything has got underway and the venture on account of which they formed the partnership proceeds, then we apply the same distinction as in mandate, so that if the death of one partner is unknown to the others, the partnership holds, whereas, if it is known, it is dissolved. 11. As partnership does not pass to a partner's heirs, neither does it pass to an *adrogator*. Otherwise, someone might be made a partner against his will to someone with whom he does not wish to be associated in partnership. But a partner who has himself undergone *adrogatio* remains a partner, just as a son will remain a partner after emancipation. 12. We have already said that partnership is dissolved also by confiscation. This is held to apply to the confiscation of a man's entire property, if the man whose property is confiscated is a member of a partnership; if someone else succeeds to his position, he is treated as dead. 13. If a partner pays something into the common fund after the partnership has broken up, he cannot get it back through an action on partnership, because it is not the case that what he did was done for the partnership, or for the common benefit of the partners. Account can be taken of the matter in the context of an action for dividing common property; for although the partnership has been wound up, the division of the property is still to come. 14. If some money is common and is in the hands of one partner and another partner is short of money, then only the man who has the money can be sued. Once this is deducted, all can bring actions to recover what is owed to each from that which is left. 15. Sometimes it is necessary to launch an action on partnership even when the partnership is still in operation. An example is a partnership formed for the purpose of tax collection, where, because of the existence of various contracts, it suits neither partner to withdraw from the partnership, and what comes to any one partner is not paid into the common fund. 16. If one partner is married and when the partnership is wound up he is still married, he ought to take the dowry; it is right that the man who bears the expenses of the marriage should have it. If, on the other hand, the marriage has come to an end already when the partnership breaks up, the dowry should be recovered the same day it is supposed to be handed over.

66 GAIUS, *Provincial Edict, book 10:* If, however, at the time the partnership is dissolved, the position concerning the dowry is that it definitely should not be handed over, in whole or in part, then the judge is to divide it between the partners.

67 PAUL, *Edict, book 32:* If one partner sells goods owned in common with the agreement of his co-partners, the proceeds are to be divided in such a way that he will receive a *cautio* against loss. If, however, he has already suffered loss, this will be made good to him. But suppose the proceeds have been distributed without any such undertaking being given, and the partner who sold has had to pay something; suppose, in addition, that not all the partners are solvent. Can anything which cannot be recovered from some partners be obtained from the rest? Proculus is of the opinion that whatever cannot be recovered from some partners does become the responsibility of the rest and that reason is on the side of this judgment, since partners agree when they form a partnership that loss as well as profit is to be shared. 1. If a member of a partnership which is not one in all goods lends money from the common fund and receives interest on it, he is obliged to share that interest only if he has lent out the money in the name of the partnership. If he lent it in his own name, he can keep the interest himself, since the risk of the capital is borne by him. 2. If a partner is required to spend some of his own money in partnership business, he can keep the interest as well by an action on partnership, supposing, for example, that he lends out money he had borrowed at interest. But even if it is his own money that he is investing, there will be some reason for saying that he has a right also to such interest as he would be able to enjoy if he had made the loan to another. 3. A partner is ordered to pay to the extent of his means only if he confesses that he was a partner.

68 GAIUS, *Provincial Edict, book 10:* No partner can sell more than his own share, even if the partnership is in all goods. 1. A man sells his goods to evade an action against him in the future. Is he to be thought to be arranging matters so that he will be unable to pay? And is this a charge that can be leveled also against a man who loses an opportunity of making a profit? The better opinion is that the proconsul is thinking of a man who sells his property. This can be deduced from interdicts in which these words occur: "because you fraudulently took steps to rid yourself of possession."

69 ULPIAN, *Edict, book 32:* When a partnership has been formed for the purpose of making a purchase, and it has been agreed that one partner should furnish *nundinae*, that is, feasts, for the rest, and release them from the venture if he fails to furnish them, he can be sued in an action on partnership and also in an action on sale.

70 PAUL, *Edict, book 33:* No association of partnership is formed for all time.

71 PAUL, *Epitome of the Digest of Alfenus, book 3:* Two men formed a partnership to teach grammar, and agreed that they would share between them any profit they might make from that employment. They set down in a formal agreement of partnership the terms they wished to be observed, and then made a stipulation as follows: "Do you promise that the things written down above will be duly given and done, and that nothing will be done against the terms? Do you promise to give me twenty thousand if the things so stipulated are not given and done?" The question was asked whether it was possible to sue by an action on partnership if something was done against the agreed terms. This answer was given: If, after making a formal agreement of partnership, they made a stipulation in these words, "do you promise that these things that have been agreed will be given and done," then it follows that, provided they did this as a novation, an action for partnership would not be possible, but the whole matter would be held to have the status of a stipulation. However, as they did not stipulate, "do you promise that these things that have been agreed will be given and done," but "do you promise to give ten if the things agreed are not done," then the matter is not considered to have the status of a stipulation, but to be only a case of a penalty (as

the promisor was not under an obligation in both directions, both to give and do, and to pay a penalty if he failed in this), and therefore proceedings can be undertaken by way of an action on partnership. 1. Two freedmen of the same patron formed a partnership "for gain, profit, advantage." Subsequently, one of them was made heir by the patron, while the other was given a legacy. It was judged that neither of them had to make over what they had received into a common fund.

72 GAIUS, *Common Matters, book 2:* A partner is responsible to his co-partner even on the score of negligence, that is, laziness and carelessness. But negligence should not be assessed on the basis of a comparison with the most stringent standards of diligence. It is enough that a partner show diligence in the affairs of the partnership commensurate with that which he is accustomed to exhibit in his own affairs. A partner who acquires as co-partner a man of inadequate diligence has only himself to blame.

73 ULPIAN, *Replies, book 1:* The reply given to Maximinus was to this effect: Those who form a partnership in all goods, including those which each of them might acquire subsequently, must bring into the common stock any inheritance they might receive. Maxima was informed by the same authority that if a partnership in all goods were to be formed on the terms that any expense incurred or gain made was to be treated as expense or gain for both partners, then also any money expended in honor of the children of one of them was to be charged to them both.

74 PAUL, *Edict, book 62:* If a man makes a contract of partnership, anything he buys becomes his own and is not shared; but he can be compelled to share it by an action on partnership.

75 CELSUS, *Digest, book 15:* If a partnership is formed on the basis of shares which Titius shall decide, but Titius dies before he can make his decision, then the venture cannot go ahead. For precisely this point was agreed upon, that there would only be a partnership on the terms decided by Titius.

76 PROCULUS, *Letters, book 5:* You formed a partnership with me subject to the condition that Nerva, a friend of both of us, would determine our respective shares in the partnership. Nerva's decision was that you would be partner for a third and I for two thirds. You ask whether this is valid by partnership law or whether, in fact, we should not be partners in equal shares. My view is that you would have done better to ask me whether we could be partners for the shares he determined or for such shares as ought to be determined by a good man. There are, in fact, two kinds of arbitrators. The first we are obliged to obey whether he is fair or unfair; this principle applies in cases where people go to an arbitrator having made a mutual promise to abide by his decisions. The other is one whose decision must be made to conform with the judgment of a good man, even if the person by whose decision the matter is to go forward is expressly identified.

77 PAUL, *Questions, book 4:* For example, where it was specified in the terms of a contract for work to be done that the work should be done to the satisfaction of the employer.

78 PROCULUS, *Letters, book 5:* But in the case before us, my judgment is that the decision of a good man ought to be followed, the more so because the partnership action is an action of good faith.

79 PAUL, *Questions, book 4:* Thus, if the decision made by Nerva is so perverse that it is seen to be palpably unjust, then it can be amended by means of an action of good faith.

80 PROCULUS, *Letters, book 5:* Suppose, for example, that Nerva had decided that one man should be a partner for a thousandth part and the other for nine hundred and ninety-nine thousandths. Of course, it may be compatible with the judgment of a good man that we should not be partners in equal shares, as when one man's contribution to the partnership will be greater in terms of service, hard work, influence, or money.

81 PAPINIAN, *Questions, book 9:* A partner promises a dowry on behalf of his daughter, but dies before he can pay it, leaving her as his heir. She then negotiates with her husband over his claim for the dowry, and he formally releases her. If he were to bring an action on partnership, would he have the right to take the amount of the dowry, supposing that it had been agreed between the partners that it would be provided out of common property? My verdict was that there was nothing unfair about this agreement, especially if it did not make reference to the daughter of one of them only; if the agreement did, in fact, apply to both of them, then it was immaterial that only one of them had a daughter. But if the woman died in matrimony, and her father recovered the dowry he had paid, then he would be under obligation to give the money back to the partnership. This is the way I interpret the agreement in accordance with the principle of justice. But if, while the partnership is still in existence, the marriage were to be dissolved by divorce, then the dowry can be recovered subject to the same conditions, namely, for payment to a second husband. Should the first husband prove unable to pay up, the dowry ought not to be furnished again from partnership funds, unless this was expressly provided for. But, in the matter in issue, it was considered of great importance whether the dowry had been paid over or had only been promised. If the dowry was actually given and the daughter simply took possession of it after becoming heir to her father, then there would have been no obligation to pay back the money to the partnership, since the woman would have had it, even if someone else had been heir; but if she had been granted a formal release by her husband, then the partnership could certainly not be charged with failing to pay the money.

82 PAPINIAN, *Replies, book 3:* By the law of partnership, a partner is not liable to incur debt through a co-partner unless the money was paid into the common fund.

83 PAUL, *Manuals, book 1:* A tree grows on a boundary; a stone lies within two adjacent farms. Since a tree when it is cut down, and a stone when it is removed, belongs to the man from whose land it was taken, are we to say that it is the property of the two owners for the same shares as when it was still on the land? Or by analogy with two lumps of metal belonging to two owners which, when fused together, become one lump, shared in its entirety between them, do we say that the tree, simply by being removed from the ground, takes on its own nature embodied in a single entity? Common sense dictates that both owners retain the same shares in the stone or tree as they had in the ground.

84 LABEO, *Posthumous Works Epitomized by Javolenus, book 6:* Whenever a partnership is formed at the request of a man either with his son or with someone from outside the family, proceedings can be launched directly against the person whose membership was contemplated when the partnership was formed.

BOOK EIGHTEEN

1

CONCLUSION OF THE CONTRACT OF PURCHASE, SPECIAL TERMS AGREED BETWEEN THE VENDOR AND PURCHASER, AND THINGS WHICH CANNOT BE SOLD

1 PAUL, *Edict, book 33:* All buying and selling has its origin in exchange or barter. For there was once a time when no such thing as money existed and no such terms as "merchandise" and "price" were known; rather did every man barter what was useless to him for that which was useful, according to the exigencies of his current needs; for it often happens that what one man has in plenty another lacks. But since it did not always and easily happen that when you had something which I wanted, I, for my part, had something that you were willing to accept, a material was selected which, being given a stable value by the state, avoided the problems of barter by providing a constant medium of exchange. That material, struck in due form by the mint, demonstrates its utility and title not by its substance as such but by its quantity, so that no longer are the things exchanged both called wares but one of them is termed the price. 1. And today it is a matter for doubt whether one can talk of sale when no money passes, as when I give an outer garment to receive a tunic; Sabinus and Cassius hold such an exchange to be a sale, but Nerva and Proculus maintain that it is barter, not sale. Sabinus invokes as authority Homer who, in the lines which follow, relates that the army of the Greeks bought wine with copper, iron, and slaves: "Then the long-haired Achaeans bought themselves wine, some with copper, others with splendrous iron, ox-hides, oxen themselves, or slaves." These lines, however, suggest barter not purchase, as also do the following: "And now Jupiter, son of Saturn, so deranged the mind of Glaucus that he exchanged his armor with Diomedes, son of Tydeus." Sabinus would have found more support for his view in what this poet says elsewhere: "They bought with their possessions." Still the view of Nerva and Proculus is the sounder one; for it is one thing to sell, another to buy; one person again is vendor and the other, purchaser; and, in the same way, the price is one thing, the object of sale, another; but, in exchange, one cannot discern which party is vendor and which, purchaser. 2. Sale is a contract of the law of nations and so is concluded by simple agreement; it can thus be contracted by parties not present together, through messengers, or by correspondence.

2 ULPIAN, *Sabinus, book 1:* Normally, there can be no sale and purchase between a

head of household and his son-in-power, but there can be in respect of the latter's military acquisitions. 1. There is no sale without a price. At the same time, it is not payment of the price but the agreement which concludes the contract, when that contract is not in writing.

3 ULPIAN, *Sabinus, book 28:* If a thing is sold on the terms that if it did not please, the sale shall be off, it is settled that not the sale itself but its possible dissolution is subject to a condition.

4 POMPONIUS, *Sabinus, book 9:* The purchase of a freeman or of sacred or religious land who or which cannot be held as property is considered valid, so long as the purchaser does not know,

5 PAUL, *Sabinus, book 5:* because it can be difficult to distinguish a freeman from a slave.

6 POMPONIUS, *Sabinus, book 9:* However, the younger Celsus says that you cannot wittingly buy a freeman or anything, the alienation of which you know to be forbidden; for instance, sacred or religious land or land excluded from private dealings, such as those public lands which are not in the public purse but are for public use, such as the Field of Mars. 1. If land has been sold on the terms that the price shall be paid in three annual installments and that if the money be not paid on the due date, the sale will be off as also that in such case, the purchaser is to restore any produce which he has gathered by cultivating the land in the period before avoidance of the sale and that if the land be subsequently sold to a third party for less than the original price, the purchaser is to make good the deficiency to the vendor, then, in the event of default of payment on the due date, it is clear law that the vendor has the action on sale. It must not disturb us that the action on sale should be available after the sale has ceased to exist; for in contracts of sale and purchase, we must look to what the parties intended rather than to what they said, and despite the formulation of the provision, it is clear that the intention was simply that the vendor should no longer be under obligation to the purchaser if there were a default in payment on the due date, not that all obligations arising from the sale and purchase should be dissolved on both sides. 2. A condition stated in the original contract can be varied by subsequent agreement; indeed, the whole contract may be called off, if there has, as yet, been no performance of the obligations of either party.

7 ULPIAN, *Sabinus, book 28:* The sale of a slave "if he shall have settled his accounts to his master's satisfaction" is conditional; now conditional sales become perfect, only when the condition is satisfied. Does the condition mentioned refer to the master's personal satisfaction or to the satisfaction of an honorable man? If we accept the former interpretation, the sale is null as would be also the case where a man would sell, if he chose to do so, or if he promised in a stipulation, "I will give ten if I want to"; it cannot be left to the decision of a contracting party whether he is under an obligation. Accordingly, it was settled by the earlier jurists that one looks to the judgment of an honorable man and not to that of the master himself. Hence, if the accounts were acceptable but he refused them or if he, in fact, accepted them but pretended not to, the condition of purchase would be realized and the vendor could be sued by the action on purchase. 1. A purchase "for what you paid for it" or "for what I have in my cash box" is valid; there is no uncertainty of price in so obvious a sale: The case is one of ignorance of its amount rather than of the real existence of the price. 2. If a man buys on the following terms, "I buy this land for a hundred and as much beyond that sum that I receive on selling it," the sale is good and operative forthwith. There is a definite price of a hundred which will, however, be increased if the purchaser sells for more.

8 POMPONIUS, *Sabinus, book 9:* There can be no sale without a thing to be sold. Nev-

ertheless, future produce and offspring are validly purchased so that when the offspring is born, the sale is regarded as having been complete from the time of agreement. But if the vendor takes steps to prevent the birth or the growing of produce, he will be liable to the action on purchase. 1. Sometimes, indeed, there is held to be a sale even without a thing, as where what is bought is, as it were, a chance. This is the case with the purchase of a catch of birds or fish or of largesse showered down. The contract is valid even if nothing results, because it is a purchase of an expectancy and, in the case of largesse, if there is eviction from what is caught, no purchase proceedings will lie, because the parties are deemed to have contracted on that basis.

9 ULPIAN, *Sabinus, book 28:* It is obvious that agreement is of the essence in sale and purchase; the purchase is not valid if there be disagreement over the contract itself, the price, or any other element of the sale. Hence, if I thought that I was buying the Cornelian farm and you that you were selling the Sempronian, the sale is void because we were not agreed upon the thing sold. The same is true if I intended to sell Stichus and you thought that I was selling you Pamphilus, the slave himself not being there: Because there is no agreement on the object of sale, there is manifestly no sale. 1. Of course, if we are merely in disagreement over the name but at one on the actual thing, there is no doubt that the sale is good; for if the thing be identified, a mistake over its name is irrelevant. 2. The next question is whether there is a good sale when there is no mistake over the identity of the thing but there is over its substance: Suppose that vinegar is sold as wine, copper as gold or lead, or something else similar to silver as silver. Marcellus, in the sixth book of his *Digest*, writes that there is a sale because there is agreement on the thing despite the mistake over its substance. I would agree in the case of the wine, because the essence is much the same, that is, if the wine has gone sour; if it be not sour wine, however, but was vinegar from the beginning such as brewed vinegar, then it emerges that one thing has been sold as another. But in the other cases, I think that there is no sale by reason of the error over the material.

10 PAUL, *Sabinus, book 5:* It would be different if the thing was gold, although of a quality inferior to that supposed by the purchaser. In such case, the sale is good.

11 ULPIAN, *Sabinus, book 28:* Now what if the purchaser were blind or a mistake over the material were made by a purchaser unskilled in distinguishing materials? Do we say that the parties are agreed on the thing? How can a man agree who cannot see it? 1. If, however, I think that I am buying a virgin when she is, in fact, a woman, the sale is valid, there being no mistake over her sex. But if I sell you a woman and you think that you are buying a male slave, the error over sex makes the sale void.

12 POMPONIUS, *Quintus Mucius, book 31:* In questions of this kind, we must look to the persons of the actual contracting parties, not to those to whom an action will accrue from the contract; if, say, my slave or son-in-power buy something in my presence but in his own name, it is his intention not mine which must be investigated.

13 POMPONIUS, *Sabinus, book 9:* However, it is true that if you knowingly sell a fugitive to my slave or mandatory who is ignorant of the fact but I do know, you will not be liable to the action on purchase.

14 ULPIAN, *Sabinus, book 28:* Now what are we to say when both parties are in error

over both the material and its quality? Suppose that I think that I am selling and you that you are buying gold, when it is, in fact, copper, or, again, that co-heirs sell to one of their number, for a substantial price, a bracelet said to be gold which proves to be largely copper? It is settled law that the sale holds good because there is some gold in it. For if a thing be gold-plated, though I think it solid gold, the sale is good. But if copper be sold as gold, there is no contract.

15 PAUL, *Sabinus, book 5:* Even though there is agreement on the thing, if the thing ceases to exist before the sale, the contract is void. 1. The purchaser can profit only by such ignorance as does not reveal negligence on his part. 2. Pomponius says that if you sell me what, in fact, belongs to me although I do not know it and, at my behest, deliver it to someone else, my ownership does not pass to him, because the intention was that not my but your ownership should be transferred to him. It follows that the same holds good if, intending a gift to me of what is really mine, you, on my instructions, deliver the thing to someone else.

16 POMPONIUS, *Sabinus, book 9:* Regardless of the purchaser's state of knowledge, purchase of one's own property is void; but if he bought in ignorance, he can recover the price he paid, because he was under no obligation. 1. There is, though, no bar to the purchaser when the purchaser presently has only a usufruct in the thing,

17 PAUL, *Edict, book 33:* though the price will be reduced at the judge's discretion.

18 POMPONIUS, *Sabinus, book 9:* Again, if a thing which he owns in common with someone else should be sold to the purchaser, it must be said that, the price being apportioned, the purchase is valid in part, in part invalid. 1. If a slave, on his master's orders, should, whether by mistake or deliberately, indicate confines of the land sold which are greater than is really the case, it is to be accepted that what the vendor intended is what has been pointed out. Alfenus adopted the same view over vacant possession transferred through a slave.

19 POMPONIUS, *Quintus Mucius, book 31:* When I sell something, it becomes the property of the recipient only if I have received the price or have accepted security in respect thereof or the purchaser has been given credit without security.

20 POMPONIUS, *Sabinus, book 9:* It is the view of Sabinus that if I ask that something be made for me, a statue, say, or some vessel or garment, I doing nothing except pay money, the contract is one of purchase and that there can be no question of letting and hiring where there is no provision of the materials from which the thing is to be made; it would be a different matter if I provided the site on which a building is to be erected, because then the principal thing does come from me.

21 PAUL, *Sabinus, book 5:* Labeo writes that where a term of the contract is obscure, it should be construed against the vendor who stated it rather than against the purchaser, because the vendor could have declared his will more explicitly before the contract was entered into.

22 ULPIAN, *Sabinus, book 28:* A term to the effect, "if any of the land be sacred or religious, it is not included in the sale," is not superfluous because it pertains to minor tracts. But if the whole of what was sold was religious or sacred or public property, there would be no purchase.

23 PAUL, *Sabinus, book 5:* (And the purchaser could recover what he paid for it by a *condictio.*)

24 ULPIAN, *Sabinus, book 28:* In the case of minor tracts, however, the action on purchase will lie, because the sacred or religious plot is not sold as such but is part of the overall sale.

25 ULPIAN, *Sabinus, book 34:* If a sale be made of "this or that," the thing, in fact, sold will be that which the vendor chooses. 1. One selling land does not have to make the purchaser owner of the land as would one who promised land by stipulation.

26 POMPONIUS, *Sabinus, book 17:* If I knowingly buy from one banned from dealing with his property or from one who has been allowed time to deliberate whether he will accept an inheritance, subject to the proviso that he does not diminish it in the meantime, I will not become owner of the thing; the case is different from my knowingly buying from a debtor defrauding his creditor.

27 PAUL, *Sabinus, book 8:* One who buys a thing from someone, whoever it might be, thinking it to be the vendor's, makes a valid purchase; but if a man buy from a *pupillus* without the endorsement of the ward's *tutor*, or with the endorsement of one whom he knows to be not in truth the *tutor* of the *pupillus*, he is not regarded as buying in good faith; and this is what Sabinus also wrote.

28 ULPIAN, *Sabinus, book 41:* There is no doubt that one can sell a third person's property; there is a valid sale and purchase, even though the thing may be taken away from the purchaser.

29 ULPIAN, *Sabinus, book 43:* Whenever a slave be sold, he is not sold with his *peculium*; hence, whether or not the *peculium* be expressly reserved, he is sold without his *peculium*. In consequence, if a thing, part of the *peculium*, be purloined by the slave, a *condictio* will lie in respect of it, as if it had been stolen—obviously, in the event that the thing comes into the hands of the purchaser.

30 ULPIAN, *Edict, book 32:* For my part, I think that the action for production is no less possible and so is that on sale.

31 POMPONIUS, *Sabinus, book 22:* Still, if there be some subsequent accretion to the *peculium*, say, the offspring of a slave-woman or the remuneration of a *vicarius*, it must be delivered to the vendor.

32 ULPIAN, *Sabinus, book 44:* Suppose a banker sells his premises or someone else whose business premises are on public land; he sells simply his right to trade there, not the land as such; for such premises are public property, even though their utilization is a matter of private concern.

33 POMPONIUS, *Sabinus, book 33:* Let us put the case that a provision of a sale runs as follows: "Let flows and eaves-droppings be as they now are" and no specification is made of the flows and the eaves-droppings; the first thing to consider is what the parties intended; should that be not manifest, the term is to be interpreted adversely to the vendor, for the statement is ambiguous.

34 PAUL, *Edict, book 33:* Suppose again that when land is bought, it is said that the slave Stichus will go with the land, but it is not clear which of several slaves is to be the accessory, the purchaser envisaging one and the vendor another, the sale of the land as such is nonetheless valid; Labeo, incidentally, says that the Stichus intended by the vendor is the accessory to the sale; and it does not matter whether the accessory be worth more or less than the principal object of sale; for we often buy something by reason of what goes with it, say, a house by reason of its marbles, statues, or pictures. 1. There can be a valid sale of anything which one may have, possess, or sue for; but there can be no sale of anything which is excluded from *commercium* by natural law, the law of nations, or the observances of the state. 2. We cannot knowingly buy a freeman, nor is a sale or stipulation allowed with the provision, "when he shall become a slave," even though we have said that the sale of future things is possi-

ble; for it is contrary to morality to anticipate such a contingency. 3. Again, if both parties to a sale know that the object sold is stolen, no obligation is created on either side; if the purchaser alone knows, the vendor will incur no obligation, though he can obtain nothing under the contract unless he voluntarily performs what he agreed to do; but if the vendor knows and the purchaser does not, both parties are bound by the contract. Pomponius also wrote to the same effect. 4. Purchase of one's own thing is valid if the object, from the outset, is to purchase the possession of it, which the vendor happens to have, to strengthen one's position in legal proceedings. 5. Tasting is one thing, measuring out another; for tasting affords the possibility of rejection while measuring serves not to increase or diminish the amount sold but to determine how much is being sold. 6. Suppose a purchase on the terms, "I buy Stichus or Pamphilus"; the vendor has the choice of which he will give, as would be the case with stipulation; should one die, however, the other must be given, so that the risk of the first is on the vendor, of the second on the purchaser; but if both die together, the price is payable because one, at least, was at the purchaser's risk. The same would apply if the choice were given to the purchaser, the choice being, of course, which of the two he will have, not whether to buy at all. 7. A *tutor* cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another's affairs.

35 GAIUS, *Provincial Edict, book 10:* The common practice of giving earnest in respect of a purchase does not suggest that without the earnest there would be no contract but facilitates proof of the fact of agreement on the price. 1. It is settled that no contract is concluded when the vendor says to the purchaser: "You shall buy for what you choose to give, or what you think fair or at your own estimate of its value." 2. There are those who think that there is no purchase when poison is sold, since neither partnership nor mandate is valid if it has a nefarious object; that opinion would certainly be correct for poisons which cannot be put to a useful purpose by being compounded with other ingredients; but one can say otherwise of poisons which, when so compounded, lose their harmful qualities, so that antidotes and other beneficial medicaments are prepared from them. 3. If someone asks his friend, who is going abroad, to seek out his runaway slave and sell him, he does not himself contravene the *senatus consultum* because he personally makes no sale; nor does his friend because he sells a slave who is present; the purchaser, again, buying a slave who is present, is held to enter into a valid transaction. 4. If the thing sold is lost through theft, the first thing to consider is what the parties agreed concerning its safekeeping; if they appear to have made no arrangement, such care will be required of the vendor as a good head of household would display in his own affairs. If the vendor lives up to that standard and yet the thing is lost, he will incur no liability, though he will have to make available to the purchaser his *vindicatio* and *condictio*. Against this background, we turn to the case of the man who sells a thing belonging to someone else; since he will have no *vindicatio* or *condictio*, he is to be, on that account, condemned; for if he had sold his own thing, he would have been able to cede those actions to the purchaser. 5. In the case of those things which are determined by weight, number, or measure, such as corn, wine, oil, silver, we sometimes observe the same rule as for other things, that is, that once there is agreement on the price, the sale is perfect and sometimes the rule that though there is agreement on the price, the sale is perfect only upon the weighing, measuring, or counting of the things. If all the wine, the oil, the corn, or the silver, whatever the amount, be sold for a single overall price, the law is the same as for other things. But if wine be sold by the jar, oil by the gallon, corn by the peck, or silver by

the pound, the following question arises: When will the sale be deemed perfect? The same question arises in respect of things to be counted out, if a price per thing be fixed. Sabinus and Cassius hold the view that the sale becomes perfect when the counting, measuring, or weighing has been done, the sale being, as it were, subject to the condition, "so much for each gallon or peck that you measure out" or "each pound that you weigh out" or "each item that you count out." 6. Accordingly, when a whole flock is sold at a single price, the sale is perfect upon the agreement on the price; but if it be sold at so much per beast, what we have just set out will apply. 7. Further, if part of the wine in a vat be sold, say a hundred gallons, it is most true (the point appears settled) that, until the measuring out, all risk is on the vendor; and it makes no difference whether a single price has been fixed for the whole hundred or a price of so much per gallon. 8. If a person selling land should conceal the name of the owner of neighboring land, awareness of which would have deterred the purchaser from buying, he will be liable.

36 ULPIAN, *Edict, book 43:* When, by way of gift, a person puts upon a thing a price which is not to be exacted, he is not regarded as a vendor.

37 ULPIAN, *Disputations, book 3:* If a man sells land which came to him by right of inheritance with the provision, "you shall buy it for the same price which the testator paid," and it is then discovered that the testator did not buy it but received it as a gift, the sale is treated as being made without a price; it is, therefore, like a conditional sale which is without effect, if the condition is not realized.

38 ULPIAN, *Disputations, book 7:* If someone, intending a gift, sells something below its worth, the sale is valid. For we say that a sale is wholly void only when it is made entirely as a gift; but when the sale is made at a cheap price for reasons of liberality, there is no doubt that the sale is good. At least, in general; as between spouses, a sale made at a low price by way of gift is of no effect.

39 JULIAN, *Digest, book 15:* When a debtor redeems his pledge from his creditor, he is not liable to the action on sale because he, in effect, buys his own thing and the creditor's position remains intact. 1. A man selling olives on the tree stipulated that the price should be ten pounds of oil to be produced from the crop. The probable interpretation is that he intended the price to depend upon the yield of the crop up to ten pounds. Hence, if the yield be only five pounds, the purchaser cannot claim more than that. This was the reply of many jurists.

40 PAUL, *Epitome of the Digest of Alfenus, book 4:* The vendor of land laid down a provision that the purchaser should measure the land within the next month and report its extent and that if he did not so report within the specified period, he, the vendor, would be free of any liability in the matter. The purchaser, within the period, reported the extent to which he found the land deficient in acreage and received compensation therefor. The purchaser himself subsequently sold the land and, on measuring it out for his own purchaser, discovered it to be much less in area than he had thought and asked whether he could claim from his own vendor for this deficiency. The answer was that it depended on how the initial provision was framed; if the term was that the purchaser should measure the land within the month and report to the owner the deficiency in its acreage, he will not profit by the further deficiency which he discovers after that month; but if the agreement was that he should measure within the month and report the extent of the estate, then, even though he may have reported,

within the month, a deficiency in acreage, he can, even after some years, recover for the true extent of the deficiency. 1. A provision in the sale of land said that water rights went with it; the question was whether a right of way to the water was also included. The reply was that the parties would appear to have intended that the vendor should also confer the right of way. 2. A vendor of land said that it comprised eighteen acres and stipulated a definite price per acre for it, as it should be measured: It was found that there were really twenty acres; the ruling was that the price of twenty was to be paid. 3. The vendor of land reserved corn sown by hand; on the land, a crop appeared from haulm; the question was whether it came within the clause. The answer was that it is of the greatest importance what the parties really agreed but that on the wording of the pact, there was not included what so grew, any more than that growing from what fell from the sower's bag or from that which fell, dropped by birds from above. 4. Where a vendor of land had reserved all its produce, the answer was that this included reeds for cutting and woodland. 5. A vendor said that the jars which were on his land would go with the land; the reply was that those also, which a slave who was cultivating the land had bought with his *peculium*, must go to the purchaser. 6. Again, waterwheels are no less part of a building than are water jars.

41 JULIAN, *Urseius Ferox, book 3:* A man agreed to buy land from one who had mortgaged it to a third party, provided that the vendor discharged the encumbrance before the first of July. The question was whether the purchaser could effectively bring the action on purchase to require the vendor to redeem the land. The reply was: Let us consider what was agreed between the parties. If their agreement was that come what may, the vendor should redeem the land before the first of July, the action on purchase will lie for its redemption and the sale will not be regarded as conditional, as though the purchaser said, "I will buy the land, if you redeem it by the first of July" or "provided that you redeem it in that time from Titius." But if the purchase were made under a condition, there will be no action to get the condition realized. 1. You unwittingly sold me, who did not know the facts, a silver-covered table as solid silver; the purchase is of no effect and a *condictio* will lie to recover the money paid.

42 MARCIAN, *Institutes, book 1:* Owners can, neither directly nor through procurators, sell their recalcitrant slaves to fight wild animals. The deified brothers so provided by rescript.

43 FLORENTINUS, *Institutes, book 8:* What a vendor says at the time of sale to commend his merchandise imposes no liability upon him, if its content be obvious, say, that the slave is handsome or a house well built. But if he assert that a slave is well educated or a craftsman, he must make that good; for he obtains a higher price in consequence. 1. There are, further, even some undertakings which do not bind the vendor, the case being such that the purchaser cannot be unaware of the facts; an instance is that of one buying a slave who has lost his eyes and stipulating for his soundness in which case, the stipulation is taken to refer to the rest of his body rather than to that in respect of which the purchaser has deceived himself. 2. The vendor must guarantee that he is free of fraud, which comprises not merely the use of obscure language in order to deceive but also circumventing concealment.

44 MARCIAN, *Rules, book 3:* Should a man buy together, for one price, two slaves, one of whom is dead at the time of the sale, there is no purchase of the other one, either.

45 MARCIAN, *Rules, book 4:* In a book of his *Posthumous Works*, Labeo writes that if a person should buy secondhand garments as being new, Trebatius was of opinion that the purchaser should have his damages made good, if he unwittingly bought secondhand articles. This view is also endorsed by Pomponius and by Julian who further says that the vendor is liable for the difference in value, if he innocently sold secondhand clothes, but that if he were aware of the fact, he is liable for all resultant loss to the purchaser. Similarly, if a person should unwittingly sell as gold a vessel of gold alloy, he will be liable for the gold which he purported to sell.

46 MARCIAN, *Informers, sole book:* No one is allowed, in respect of the office which he exercises, to buy anything, either directly or through an intermediary; should he do so, he not only loses the thing but is liable to a fourfold penalty, as was ruled by Severus and Caracalla. This applies also to the emperor's own procurator. But the rule holds good only in respect of those who have not been granted the power to make such purchase.

47 ULPIAN, *Sabinus, book 29:* Where the right to draw water pertains to land and the right passes to the purchaser, then, although nothing be said on the point, so do the pipes through which the water is drawn,

48 PAUL, *Sabinus, book 5:* even though they be outside the premises;

49 ULPIAN, *Sabinus, book 29:* and even if the right of water, having been lost, should not pass, the pipes and canals on the land do, coming to the purchaser as part of the premises; and so wrote Pomponius in his tenth book.

50 ULPIAN, *Edict, book 11:* Put the case that you sell me a library, if the Capua council sell me a site on which to house it and, through my own fault, I do not seek a site from the council; Labeo says that without question, an *actio praescriptis verbis* will lie against me. Personally, I think that the action on sale will lie, the condition being treated as satisfied, since it is the purchaser's fault that, in fact, it is not.

51 PAUL, *Edict, book 21:* Shores which adjoin the land sold are not included in its area because they belong to no one, being open to all under the law of nations, so also with public roads and sacred or religious places. Hence, for the vendor's protection, a proviso should be made for the inclusion of shores and public places in the overall area.

52 PAUL, *Edict, book 54:* The senate ordained that no one should destroy a dwelling or a country house, in order to make a profit thereby, nor buy or sell one for the purpose of such traffic; should anyone contravene the *senatus consultum*, the penalty provided is that the purchaser must pay double the price to the state treasury and that, for the vendor, the sale is void. Of course, if you have paid me the price, you can recover it from me, when you have to pay double to the treasury, since, from my point of view, the sale has been nullified. This *senatus consultum* applies not only when a man sells his own house, in town or country, but also when it is the house of another.

53 GAIUS, *Provincial Edict, book 28:* For the thing to become the purchaser's property, it matters not whether the price has been paid or a verbal guarantor been accepted in respect of it. Verbal guarantor is to be interpreted liberally so that, however the vendor be secured in respect of the price, whether by personal or by real security, it is as though the price had been paid.

54 PAUL, *Curule Aediles' Edict, book 1:* A thing sold in good faith is not to become unsold for some trivial cause.

55 PAUL, *Curule Aediles' Edict, book 2:* A wholly colorable sale is no sale at all and so property will not pass.

56 PAUL, *Edict, book 50:* If someone should sell a slave-woman with a proviso that she is not to be put to prostitution, then, in the event of a breach of this term, the original vendor will be entitled to take her back, regardless of the number of purchasers through whose hands she may have passed.

57 PAUL, *Plautius, book 5:* I bought a house, both the vendor and I being unaware that it had been burned down. Nerva, Sabinus, and Cassius say that even though the site remains, there is no sale and the price, if paid, can be recovered by *condictio.* But where part of the house is still standing, Neratius says that the issue is largely dependent on how much of the house remains; if the greater part of it has been destroyed, the purchaser will not be obliged to perform the contract and can recover anything which he may have paid; if, however, half or less has been consumed by fire, then the purchaser will be required to honor the contract, an estimate being made, on the standard of an honorable man, to relieve him of payment of the amount by which the fire has reduced the value of the house. 1. Now if the vendor knew of the fire but the purchaser did not, no sale exists, if the whole house was destroyed before the contract was made; but if any part of the building remains, the contract stands, and the vendor must make good his damages to the purchaser. 2. Similar considerations apply in the opposite case of the purchaser's knowing when the vendor does not. Here again the sale will stand and the whole price, if not already paid, must be paid by the purchaser to the vendor; and if it has been paid, it cannot be recovered. 3. But where both vendor and purchaser know that the house has been burned, whether in whole or in part, there is no contract because the fraud of each is set off against that of the other and the fraud of both bars the grant of an action grounded in good faith.

58 PAPINIAN, *Questions, book 10:* Further, where trees have been blown down or destroyed by fire, one cannot hold that a valid sale has been made, if the purchase was made because of those trees, as in the case of an olive grove, and that, whether the vendor knew or not. But knowledge or ignorance of the purchaser or of both leads to the same results as in the preceding cases of the burned house.

59 CELSUS, *Digest, book 8:* If you sell land without declaring it to be free from all encumbrances, the view of Quintus Mucius is correct that you have only to convey the land as it is and not as being unencumbered. The same holds good for urban properties.

60 MARCELLUS, *Digest, book 6:* A term of a sale of land provided that sixty jars would go with it to the purchaser; there being a total of a hundred jars, the reply was that the vendor had the choice of those that he would give.

61 MARCELLUS, *Digest, book 20:* I think that it is possible for me to make a conditional purchase of my own thing, since there may be an expectation that it will cease to be mine.

62 MODESTINUS, *Rules, book 5:* One serving in a province as an administrator or a soldier cannot buy land in that province, unless it be ancestral property being sold by the imperial treasury. 1. If a person unwittingly buys sacred, religious or public land as being private, then, although there is no valid purchase, he can nonetheless have the action on purchase against his vendor for the damages he has suffered through being deceived. 2. Where there is no bad faith on the vendor's part, a thing purchased at a global sum is at the purchaser's risk, although it has not yet been transferred to him.

63 JAVOLENUS, *From Cassius, book 7:* Suppose a master to direct his slave to sell something to a particular person; if he sells to someone other than that person, the sale is null; the same would apply if the master asked a freeman to sell it; a sale cannot stand, if made to someone to whom the principal has no wish to sell. 1. Where land is pointed out, it is not necessary to specify its boundaries: If they are specified, it is for the vendor himself to specify, if he should chance to possess another field adjoining.

64 JAVOLENUS, *Letters, book 2:* I bought this land for me and Titius: I ask whether the sale is good in whole or in part or is a nullity. The reply is that the mention of Titius should be held superfluous and so the purchase of the whole land is for myself.

65 JAVOLENUS, *Letters, book 11:* I agreed with you that you should make and supply me with a certain number of tiles at a certain price. Is this sale or hire? The reply was that if the agreement was that I should furnish tiles made out of clay from my own land, I think that to be sale, not hire. There is hire only when the material from which the goods are to be made remains in the same condition and ownership; when it is both changed and alienated, we must infer a sale rather than a hiring.

66 POMPONIUS, *Quintus Mucius, book 31:* When land is sold, certain obligations are due, even if not stated, such as that the purchaser shall not be evicted from the land or the usufruct of it. Other obligations are due only if made express, such as that the rights of way and of drawing water will be forthcoming; the same is true of urban servitudes. 1. If, in the sale of land, the vendor does not mention a servitude running with it but deliberately keeps silent about it so that the purchaser, being unaware of its existence, loses the servitude through nonuse for the recognized period, there are those who rightly hold that the action on purchase will lie against the vendor for his fraud. 2. Quintus Mucius writes that a person who writes that "things dug up or cut down are not part of the land or building" writes the same thing twice; for such things are those which are part of neither the land nor the building.

67 POMPONIUS, *Quintus Mucius, book 39:* When we convey a thing, we transfer ownership of it together with all that would pertain to it, if it had remained ours. This is a general rule at civil law, unless something else has been specifically stated.

68 PROCULUS, *Letters, book 6:* If, in selling land, you include an express term that what you get as rent from a tenant of the land shall also go to the purchaser, I am of opinion that you have not merely to show good faith in collecting the rent but also diligence, that is, you are liable not only for fraud but also for negligence. 1. Many parties add the words: "The vendor must abstain from fraud"; but he would be under that duty, even without such express provision. 2. He is not seen so to abstain, if the purchaser is unable to possess the land because of something the vendor has done or may do. And so the action on purchase will lie not to require the vendor to transfer vacant possession; for there are many contingencies which might make transfer impossible for him, but for the estimated value of the damage caused by the fraud that he has committed or is committing.

69 PROCULUS, *Letters, book 11:* Rutilia Polla bought the lake Sabatenis Angularius and ten feet of land around the lake. I ask whether, when the ten feet around the lake at the time of sale are submerged because the lake has spread, the next ten feet legally belong to Rutilia Polla. Proculus replied: "I think that the lake purchased by Rutilia

Polla was sold as it then was with the ten feet then around it and that she is not to have more than she bought, by reason of the fact that the lake has spread."

70 LICINNIUS RUFINUS, *Rules, book 8:* The majority of jurists has held that there can be a valid purchase of a freeman, if both vendor and purchaser are unaware of his status, so also where the vendor knows but the purchaser does not. But if the purchaser knowingly buys a freeman, there is no valid purchase.

71 PAPIRIUS JUSTUS, *Imperial Rulings, book 1:* The emperors Antoninus and Verus Augusti sent a rescript to Sextius Verus in the following terms: "The measures and prices with which tradesmen deal in wine are a matter for the contracting parties; no one is obliged to sell, if dissatisfied with the price or the measures, especially when nothing is done contrary to the custom of the region."

72 PAPINIAN, *Questions, book 10:* Agreements subsequent to the contract, which reduce the obligation in it, are treated as part of the contract but not those which increase it. This applies to ancillary provisions, say, that the stipulation for double the price will not be required or, on the other hand, that it shall both be given and verbally guaranteed. In such a case, the pact is of no avail if the purchaser be the plaintiff on it; but it will operate as a defense when the vendor brings proceedings. It is a proper matter of doubt whether the same can be said of a subsequent raising or lowering of the price, since the price was of the essence of the sale. PAUL notes: If, while the transaction is wholly executory, there is a later agreement which raises or reduces the price, the initial contract is deemed to be resiled from and a new sale to have been made. 1. PAPINIAN: Suppose a sale term which says: "If any part be sacred, religious, or public in nature, it is excluded from the sale," and there is some element in what is sold which, though not in public use, belongs to the imperial treasury, its inclusion in the sale is valid, and the vendor cannot avail himself of a defense which, in the circumstances, is inapplicable.

73 PAPINIAN, *Replies, book 3:* When a temple is destroyed by an earth tremor, its site is not profane and so cannot be the object of a sale. 1. Within the walls of a burial ground, the places that remain pure, kept as gardens and the like, belong to the purchaser unless the vendor expressly excludes them.

74 PAPINIAN, *Definitions, book 1:* When the keys of a warehouse are handed over, possession of the merchandise is deemed to be delivered, so long as the keys are handed over at the warehouse. The purchaser then becomes owner forthwith and also possessor, even though he has not opened the warehouse; equally, if the merchandise did not belong to the vendor, usucapion starts at once.

75 HERMOGENIAN, *Epitome of Law, book 2:* A man selling land inserted a provision that the land should be let to him at a given rent or that if the purchaser should resell, he should do so only to his vendor, or made some similar provision; he could have the action on sale for the honoring of such provision.

76 PAUL, *Replies, book 6:* Jars embedded in a warehouse are deemed to go with it when the warehouse is sold, unless they are expressly excluded in the terms of sale. 1. One who succeeds to the purchaser's place can use the same defenses that his vendor could invoke and can also acquire by long-term prescription, if the period of possession laid down in imperial rulings be fulfilled by the total of their individual holdings.

77 JAVOLENUS, *From the Posthumous Works of Labeo, book 4:* A term in a sale of land

provided that any quarries thereon, wherever they might be, were not included in the sale; after an appreciable period, quarries were discovered on the land. Tubero held that they belonged to the vendor. Labeo, however, said that one has to look to the parties' intentions; if that cannot be ascertained, then these quarries have not been excluded from the sale; for no one can either sell or exclude what does not exist and there are no quarries unless they are visible and being hewn from; if people took a different interpretation, the whole of the land would be a quarry, if there happened to be stone below its entire surface. I endorse this view.

78 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* A term of the sale of land said that the water pipes would also pass to the purchaser; the question was whether the cistern or reservoir from which water was drawn through the pipes also passed. The answer was that although not expressly stated, it would appear that the parties' transaction was that it too should pass. 1. You bought land from someone to whose son you subsequently became the administering *tutor*, and you did not, at the time, receive vacant possession. I said that you can give vacant possession to yourself by the following means: The *pupillus* and his household leave the land and then, and then only, you enter into possession. 2. A man who bought land on the terms that he would be granted possession when the price had been paid died leaving two heirs. If one of them paid the whole price, he would recover part of it by the action to divide an inheritance; but if he paid only part of the price, he could not bring the action on purchase against the vendor, because a debt contracted in such circumstances cannot be divided. 3. When you sold crops, then in the sprouting stage, you said that you would make good anything due to force or storm; the snows ruined the crops; if the blizzards were excessive and exceptional, an action on purchase will lie against you.

79 JAVOLENUS, *From the Posthumous Works of Labeo, book 5:* You sold half your land with a proviso that the purchaser should take a lease of the other half, which you kept, for ten years at a given annual rent. Labeo and Trebatius say that you cannot have the action on sale to enforce that agreement. I would say that you can, provided that you sold at a lower price for this lease to be assured to you. For the fact that the sale was made with this provision makes the lease part of the price. And that is the law which we observe.

80 LABEO, *Posthumous Works, Epitomized by Javolenus, book 5:* When hand-sowings are excluded in a sale of land, the reservation does not comprise sowings in perpetuity but those made year by year so that their crops may be reaped; any other interpretation would exclude all vines and trees. 1. I said that there can be a purchase, enforceable by the action on purchase, of "the projections from my building to your building so that I may thus hold them." 2. The felling of timber in a wood was sold for five years; the question was asked, whose was the mast which might fall from it, the vendor's or the purchaser's? I know that Servius replied that the first consideration must be what the parties appear to have intended; should that not be ascertainable, any mast falling from trees which have not been felled belongs to the vendor but that on the trees at the time of their felling belongs to the purchaser. 3. No one can be regarded as having sold a thing, the ownership of which the parties do not intend to pass to the purchaser, that is, hiring or some other kind of contract.

81 SCAEVOLA, *Digest, book 7:* When Titius took a loan at interest of a certain number of gold pieces, he gave land in pledge or hypothec and also a verbal guarantor, Lucius, to whom he promised that he would release him from liability within the next three years and that should he not do so within the appointed time and the guarantor paid the debt to the creditor, the lands which he had charged to his creditors would be deemed purchased by Lucius. I ask, supposing that Lucius the guarantor is not released by Titius and pays the creditor, will he have, as purchaser, the lands aforemen-

tioned? The reply was that if the intention was that he should have them as a purchase and not as security, a conditional purchase was made and a valid obligation contracted. 1. Lucius Titius promised to provide annually a hundred thousand bushels of corn from his estate to that of Gaius Seius. Lucius Titius subsequently sold his estate, adding this provision: "The estate of Lucius Titius is sold and will be held with its present state and title." I ask whether the purchaser is liable to Gaius Seius for the provision of corn. He replied that, on the facts stated, the purchaser was not under obligation to Gaius Seius.

2

IN DIEM ADDICTIO

1 PAUL, *Sabinus, book 5: In diem addictio* takes the following form: "Let the land be sold to you unless someone makes a better offer before the first of January next, by which event the land departs from the owner."

2 ULPIAN, *Sabinus, book 28:* When land is sold with an *in diem addictio*, there is the question whether the sale is unconditional but with a provision for defeasance or rather itself conditional. In my view, it really depends on what the parties intended; if the intention was that, on a better offer being made, the contract shall be off, the sale will be itself unconditional but liable conditionally to resolution; if, on the other hand, the intention was that the sale should become perfect, if no better offer be made, the sale itself will be conditional. 1. Assuming an unconditional sale along the lines of our distinction, Julian writes that the person who buys subject to such provision can usucapt his purchase and profit by its fruits and accessions to it and that the risk of the thing's destruction is on him.

3 PAUL, *Sabinus, book 5:* For after the destruction of the thing, there can be no better offer.

4 ULPIAN, *Sabinus, book 28:* But when the sale is conditional, Pomponius says that the purchaser cannot usucapt nor do the fruits belong to him. 1. Julian again, in his fifteenth book, raises the question whether, when a thing so sold perishes or a slave-woman so sold dies, a better offer can be made in respect of her issue or of fruits of the thing; and he says no, because there can be no better offer for something other than what was sold. 2. In the same book, Julian writes: Supposing that two slaves are sold together for twenty, subject to an *in diem addictio* and one of them dies; if a purchaser comes forward for the survivor, offering more than twenty, can the earlier contract be resiled from? His view is that this case is different from that of the offspring and so the first sale can be ended and the second entered into. 3. Then Marcellus, in the fifth book of his *Digest*, writes that where there is an unconditional sale defeasible under an *in diem addictio*, then, on the making of a better offer, the land, if the purchaser has pledged it, ceases to be subject to the pledge; from this it can be gathered that the purchaser is owner in the interim, since otherwise the pledge would not be binding. 4. Julian again, in the eighty-eighth book of his *Digest*, wrote that one who buys land with an *in diem addictio*, can invoke the interdict against force or stealth; for that interdict lies to one who has an interest in what has been done not being done. Where land is so sold, he says, all the benefit and the burden are with the purchaser until the sale is transferred to someone else and so, if, before then, anything is done by force or stealth, he will have an effective interdict, even though a better offer be made; but, says Julian, he will have to make it over, as also any fruits which he has gathered, in an action on sale. 5. So there is either a resiling from a sale which is unconditional or the

nonperfecting of a conditional sale on receipt of a better offer; if a false [second] purchaser be put up, Sabinus elegantly writes that the first sale stands because one cannot discern a better offer when there is no true purchaser. And even if a genuine purchaser appears but does not make a better offer, the same holds; and it will be as though no second purchaser came forward. 6. A better offer can be seen in an increased price. But even without addition to the price, there is a better offer if easier or earlier payment be proposed, as also if a more convenient place of payment be suggested; so writes Pomponius, in the ninth book of *Sabinus*, who adds that an offer is also deemed better, if made by a more reliable person. Similarly, there will be a better offer if a purchaser comes forward with the same price but buys on more advantageous terms or waives guarantees. The same can be said, even if the newcomer offers a lower price but waives provisions of the first sale which were onerous to the vendor.

5 POMPONIUS, *Sabinus, book 9:* Anything which redounds to the vendor's advantage must be held a better offer.

6 ULPIAN, *Sabinus, book 28:* When it is said that interim fruits go to the first purchaser, that holds good whenever there appears no purchaser who makes a better offer or a false purchaser; but if there be a genuine second purchaser, it is settled that the first purchaser must restore the fruits, but to the vendor. So wrote Julian in the forty-eighth book of his *Digest.* 1. If someone comes forward with a better offer and the first purchaser outbids him and remains purchaser, there is room for doubt whether he has the fruits, as though no better offer was made, or rather that they are the vendor's, although it is the same person who has made the better offer. Reason points to the latter alternative, but it will depend on what the parties intended; so wrote Pomponius.

7 PAUL, *Sabinus, book 5:* It is, however, legitimate for the vendor to transfer on receipt of a better offer, unless the first purchaser is prepared to add more.

8 PAUL, *Edict, book 33:* The vendor, on receipt of a better offer, must inform the purchaser so that he may match the newcomer.

9 ULPIAN, *Sabinus, book 28:* Sabinus writes that it is permissible for the vendor to reject the better offer and adhere to the first as being preferable and that is our rule. But what if it be specifically the parties' intention that the purchaser should be able to resile when a better offer is made? The answer must be that the first sale is dissolved, even though the vendor does not accept the second.

10 JULIAN, *Digest, book 13:* Now if it be the case that a creditor sells a pledge with an *in diem addictio*, the transaction cannot be regarded as conducted in good faith, unless an addition is received. What, then, if the second purchaser has no substance and intervenes only to prevent the sale? The creditor can with impunity allot the pledge to the first purchaser.

11 ULPIAN, *Sabinus, book 28:* Sabinus writes that when land has been sold once with

an *in diem addictio*, it cannot be so sold again: His argument is that the land at once belongs to the first purchaser, as though no better offer had been made, if the land is not firmly ascribed to the second purchaser but further bidding is envisaged. But Julian writes in the fifteenth book of his *Digest* that the intentions of the contracting parties are highly relevant and that there is nothing to prevent the transaction being such that the land is frequently put up, whether the land leaves the vendor at the first, second, or third increase of price. 1. Sabinus's other proposition that if three vendors make a sale and two accept the second offer but the other does not, the thing will be bought, in respect of two by the second, in the case of the other by the first purchaser is true only if the vendors sold their shares at differing prices,

12 POMPONIUS, *Sabinus, book 9:* even if the vendors had unequal shares.

13 ULPIAN, *Sabinus, book 28:* But if they sold for a unitary price, the thing remains with the first purchaser, just as if someone sold me the whole of land with an *in diem addictio* and then, the true price being added to, he ascribed half of it to someone else. Celsus too, in the eighth book of his *Digest*, reports that Mucius, Brutus, and Labeo shared Sabinus's view; Celsus himself is of the same opinion and adds that he finds it a matter for marvel that no one has considered the point that if the first purchaser so contracted that he did not wish the purchase unless he got the whole estate, he should not have, as bought, the part which one of the co-vendors did not wish to ascribe to the new purchaser. 1. There is no doubt that even one of the co-vendors could make a better offer; for we can buy also our own part in a purchase of the whole.

14 PAUL, *Sabinus, book 5:* If a vendor should pretend that he has received a better offer, when selling to a different person for less or for the same price, he will be liable to both his purchasers in full. 1. But if the purchaser put forward someone else, less credit worthy, to whom the land is assigned, I do not see, says he, how it can be bought by the first purchaser, since there has been a subsequent and genuine sale. It is, though, true that the vendor, so deceived, has the action on sale against the first purchaser for the value of his interest in this having not happened; and in that action, the vendor will recover both for the fruits that the first purchaser may have taken and for any deterioration in the thing occasioned by that purchaser's fault, whether deliberate or negligent. Labeo and Nerva took this view. 2. If neither party put forward a new purchaser but, by reason of a higher price, the land is assigned to an insolvent, the first sale has been abandoned because the better offer is that approved by the vendor who, after all, may choose not so to assign. 3. Even if a *pupillus* subsequently buy for more without the *auctoritas* of his *tutor*, the vendor being amenable, the first sale will be abandoned, so also if the slave of someone else made the second offer. The case would be different if the vendor, in error, ascribed the thing to his own slave or son in power or to its owner; for, in such cases, there is no sale. But if he ascribes it to someone else's slave whom he thinks to be free, that will go against him as would also ascription to a person of no means. 4. The purchaser who makes a better offer acquires nothing beyond the object which is sold. 5. And so if someone else gives the same price, by the very fact that the produce which would go to the first buyer does not go to him, there cannot be deemed to be a better offer; for that was not the intention of the vendor and purchaser.

15 POMPONIUS, *Sabinus, book 9:* Suppose land to be sold with an *in diem addictio* and the vendor to have died before the period expires; then, whether an heir appears after the expiry of the period or there is no heir at all, the land is bought by the first purchaser because one cannot discern a better offer which the owner approves, when the

vendor is no longer living; but if an heir appeared before the due date, a better offer could be made to him. 1. If land, sold with an *in diem addictio*, be sold for more with a provision that there will go to the new purchaser accessions which would not have gone to the first purchaser, then, if these things are not worth less than the amount by which the second price for the land exceeds the first, the first sale stands, as though no better offer was made; but if they are worth less, the first sale ends. The same view must be taken, if a longer period for payment of the price be granted; the amount of interest that the vendor could get for that period must be investigated.

16 ULPIAN, *Edict, book 32:* In a rescript, the Emperor Severus said: "Just as the produce of a house must be restored to the vendor, if a better offer is made, so also it is just that the disbursements which the first purchaser proves to have been necessary during the interim shall be retained from the restoration and, if the produce is not sufficient therefor, that they shall be paid to that purchaser." My belief is that the emperor was thinking of the action on purchase and sale.

17 JULIAN, *Digest, book 15:* When two slaves are sold separately to two purchasers for ten apiece, with an *in diem addictio*, and someone comes forward who offers thirty for the two, it is a relevant question whether he adds ten to the price of one or five to each; in the former case, the first sale will end of the slave to whose price the addition is made; in the latter case, both will become the second purchaser's; if it be uncertain whether the addition is to the price of both, the first sale is not regarded as abandoned.

18 AFRICANUS, *Questions, book 3:* When land is sold with an *in diem addictio* to two partners, if one of them offers a higher price, he is correctly regarded as departing also from his own share of the first sale.

19 JAVOLENUS, *Plautius, book 2:* Where land is sold with an *in diem addictio*, if an increased price is offered and the vendor, adding further land, ascribes the whole to the second purchaser, he will not be liable to the first purchaser, if he acted without bad faith; for although he sells not only that to which the term applied but more again, nevertheless, if the vendor is not in bad faith, the first purchaser's cause is discharged; the only issue is whether the increase to the vendor is made in good faith.

20 PAPINIAN, *Replies, book 3:* Once a better offer is forthcoming, the first purchaser cannot proceed against the second purchaser, in respect of money paid at the outset to the vendor on account of the price, without an interposed *delegatio* by stipulation.

3

THE FORFEITURE CLAUSE

1 ULPIAN, *Sabinus, book 28:* Where land is sold with a forfeiture clause, it is presumed that the sale is unconditional with a provision for its defeasance rather than that the sale itself is conditional.

2 POMPONIUS, *Sabinus, book 35:* When the vendor of land lays down this term, "if the money has not been paid by the due date, the land shall be unsold," this is to be taken to mean that the land shall be unsold, if the vendor so choose; for the term is provided for the vendor's benefit. If a different interpretation were placed upon it, it would be in the purchaser's power in the event of the house being burned out by not paying the price to nullify the sale of the land which was at his risk.

3 ULPIAN, *Edict, book 30:* For the forfeiture clause which is added to sales will be enforced by the vendor, if he so choose, not against his will.

4 ULPIAN, *Edict, book 32:* If land be sold with a forfeiture clause, that is, with the provision that "unless the price be paid in full by a given date, the sale is off," we have to consider how the vendor may take proceedings in respect of the land, its produce, and any deterioration in it attributable to the purchaser's act. The sale is, after all, no more; but the problem of the availability of the action on sale has now been resolved by rescripts of the Emperor Antoninus and the deified Severus. 1. There is, though, reason in Neratius's statement that the purchaser sometimes retains the fruits, since he forfeits the amount of the price which he has paid; hence, the humane view of Neratius holds good when the purchaser has paid some part of the price. 2. Papinian, in the third book of his *Replies*, elegantly opines that once the forfeiture clause becomes operative, the vendor must decide whether he wishes to exercise its provision or to hold out for the price and, once having opted for forfeiture, he cannot later change his mind. 3. It is usual also, where there is a forfeiture clause, further to agree that if the vendor sells the same land at a lower price, he can exact the disparity from the original purchaser; there will, therefore, be an action on sale against him. 4. For Marcellus, in his twentieth book, it is a matter of doubt whether the forfeiture clause is operative when the purchaser does not pay on demand or only when he does not make tender. I lean to the view that he must make tender, if he wishes to escape the operation of the forfeiture clause; should there be no one to whom to make tender, he is safe.

5 NERATIUS, *Parchments, book 5:* Where land is sold with a provision that if the price be not paid within a certain time, the sale is to be off, it is to be understood that the intention of the parties is that fruits gathered by the purchaser in the period up to the specified date, he gathers for the present in his own right; but Aristo took the view that if the land reverted to the vendor, the latter should be given an action in respect of those fruits against the purchaser who should be allowed to retain nothing from a transaction in which he had broken faith.

6 SCAEVOLA, *Replies, book 2:* Questioned on the forfeiture clause, I replied that if it should be the fault of the purchaser that he does not comply with its provisions and the vendor chooses to enforce it, the sale of the land will be off and what has been given by way of earnest or under some other head will remain with the vendor. 1. I said that if the sale of land be called off under the clause that which was said to go with the land will also not be due to the purchaser. 2. The vendor received part of the outstanding balance after the period stated in the clause had expired. My answer was that if, after the stipulated date, the vendor does not enforce the clause in respect of the balance due and accepts money on account of it, he is to be regarded as waiving the forfeiture clause.

7 HERMOGENIAN, *Epitome of Law, book 2:* If the vendor brings an action for the price after the period of the forfeiture clause has expired, he is deemed to waive the clause and cannot subsequently change his mind and return to it.

8 SCAEVOLA, *Digest, book 7:* A woman sold land to Gaius Seius, and, she having accepted money by way of earnest, a period was laid down for the payment of the balance; it was further agreed that if the purchaser should fail to comply, he should forfeit the earnest and the sale would be off. The purchaser deposed that on the due date, he was ready to pay all the outstanding money (and sealed up a purse of money with the seals of witnesses) but the seller was absent and that on the following day, he was

given notice in the name of the imperial treasury that he was not to pay off the woman until he had discharged his obligations to the treasury. The question was: Was the position in respect of the land such that the seller should claim it by *vindicatio* under the term of the sale? I replied that on the case put forward, the purchaser did not fall under the forfeiture clause.

4

SALE OF AN INHERITANCE OR OF A RIGHT OF ACTION

1 POMPONIUS, *Sabinus, book 9:* The sale of the inheritance of a living or non-existent person is a nullity because the thing sold is not in existence.

2 ULPIAN, *Sabinus, book 49:* The vendor of an inheritance does not have to guarantee against eviction; for the intention of the parties is that the purchaser shall have no more and no less title than would the heir; the vendor must, of course, give security for his own conduct. 1. We must consider on the sale of an inheritance whether the object of sale is the inheritance as at the death of the deceased or as at the time of its acceptance or as at the time of sale. The true view is that the intentions of the parties should be observed; but generally, the intention is that the inheritance is sold as it stands at the time of sale. 2. The question can be asked whether, when the substitute heir of an *impubes* sells the testator's estate, what comes to him from the inheritance of the *impubes* will also give rise to the action on purchase. The better view is that it does not, because it is a different inheritance; for although there is but one will, the inheritances are separate. Of course, if that were the parties' intention, it must be said that the inheritance of the *impubes* is included in the sale, especially if that inheritance has already been offered to the vendor at the time that he sells the testator's inheritance. 3. Another question is how the inheritance is seen to have come to the vendor. I think that even before he has taken over the corporeal assets of the inheritance, it can be said to be his in the sense that he can direct the making of a claim for those assets and assign actions; but when he has taken over the assets or exacted debts due, the inheritance is more fully his. Again, if he has received the price of things sold before the sale of the inheritance, that money obviously comes to him. In regarding the estate as having come to him, we must look to reality not reason; hence, what a person delivers in respect of legacies is not regarded as coming to him; again, it is correctly said that debts of and other burdens on the inheritance do not come to him. But considerations of equity require that the value of things given away before the sale should be made over to the purchaser. 4. Now not only what comes to the vendor of the inheritance must be made over to the purchaser but also anything that his heir acquires out of the inheritance; and not only what comes at present but also anything that comes at any time through the inheritance must go to the purchaser. 5. And if, through their bad faith, there are assets which do not come to them, their value must be made good to the purchaser; one will be held so to have acted in bad faith, if he alienates anything or releases a debtor or acts deliberately so that elements of the inheritance are not acquired or does not take possession of something when he could do so. And he will be liable not only for bad faith but also for gross negligence. Losses and reductions which are not attributable to the vendor's bad faith, however, do not have to be made good. 6. The question has been asked whether the vendor of

an inheritance must account to the purchaser for a debt, owed by the son-in-power or a slave of the deceased whose estate he is selling. The view adopted was that he must so account to the extent of the son's or slave's *peculium* or to the extent that he had benefited. 7. It is asked whether, when the vendor has made a gain by reason of the inheritance, he is liable, therefore, to the purchaser. Julian discusses this point in the sixth book of his *Digest*, and he says that the heir retains what he has claimed which was not due and that he does not account for what he has paid which was not due; this is the course to adopt so that the heir does not make over to the purchaser what he has exacted which was not due, nor does he have to make good anything obtained from him which was not due. But if he paid by reason of a judgment against him, that will avail the heir, only if he was condemned without bad faith on his part, even though the person to whom he was condemned was not in fact a creditor. This view commends itself to me. 8. Not only rights of action which he inherits but also the obligations which the heir himself creates must be ceded to the purchaser; hence, if he accepts a verbal guarantor from a debtor of the inheritance, the heir must cede to the purchaser the action arising thereon; and, if he changes his ground of claim or bring his claim into court, he must make over the action that he has. 9. Just as all profit goes to the purchaser of the inheritance, so also does loss. 10. If the heir sells something, part of the inheritance, and suffers judgment in consequence, he has no action against the purchaser because judgment went against him, not as heir but as a vendor. But if he gives the price of the thing sold to the purchaser of the inheritance, we must consider whether he can then have the action on sale; I think that he can. 11. If the vendor himself, his procurator, or someone else conducting his affairs sells something as inherited, the action on sale will lie, provided that the vendor of the inheritance loses something thereby; otherwise, he will have no action. 12. We find it written in Julian that if the vendor of an inheritance reserves a slave without his *peculium* and he is sued, in respect of him, by the action on the *peculium* and benefit taken, the measure of damages recoverable by the vendor from the purchaser will be no more than what he paid in respect of that *peculium* which should go to the purchaser, or the amount of benefit to the deceased; for in these cases, he pays the debt of the purchaser, while in other actions he suffers judgment in his own name. 13. What then if the vendor of an inheritance reserved a slave with his *peculium* and, being sued on the *peculium*, paid up? Marcellus wrote in the sixth book of his *Digest* that he cannot claim for it from the purchaser, provided that the intention was that he should have the balance of the *peculium*; but if the parties intended otherwise, he says that the vendor can lawfully sue; if no express agreement was made between them but there was merely mention of the *peculium*, it is settled that the action on sale does not lie. 14. If the vendor of an inheritance reserves a house in respect of which an undertaking had been given against threatened damage, the question is what the parties intended; if the reservation was that he should himself bear the burden of the stipulation, he will recover nothing from the purchaser; but if the intention was that the purchaser should discharge this obligation, the burden of the stipulation will rest on the purchaser. Should the parties' intention not be apparent, the probability is that they intended that anything given in respect of such damage, before the sale, should be the purchaser's responsibility and that given at any other time would be the heir's. 15. If Titius sells the inheritance of Maevius to Seius and, being instituted heir by Seius, sells the inheritance to Attius, can he take proceedings against Attius arising out of the first sale? Julian says that what the vendor of an inheritance could claim from any *extraneus heres* he will recover from a purchaser of the inheritance; and certainly, if someone else had been heir to Seius, whatever the vendor of the Maevian inheritance had disbursed, he could recover from him by the action on sale. Again, if I had stipulated for

double the price of a slave from Seius and, becoming his heir, sold the inheritance to Titius, I would, on the eviction of the slave, have recourse against Titius. 16. If the vendor of an inheritance should have paid anything in respect of taxes, it must be said that he should inform the purchaser who will have to reimburse him; for these are burdens of the inheritance, so also, if he pays out anything for tribute. 17. If, having organized the funeral, the heir sells the inheritance, can he recover the funeral expenses from the purchaser? Labeo says that the purchaser should pay them because, he says, they are debts of the inheritance; Javolenus holds that to be the true view and I agree. 18. When someone becomes his debtor's heir, he ceases to be a creditor by virtue of the merger of the estates. But if he were to sell the inheritance, it appears the height of equity that the purchaser should succeed to the position of the heir of the inheritance and consequently be liable to his vendor, whether the testator was already in debt at the time of his death (although he ceased to be a debtor on his death and the acceptance of the inheritance by the vendor) or something was due as from a given date or the debt was conditional and the condition has been realized, but with this proviso: If the debt were such that action against the heir would have been possible in respect of it, and it was not one of those cases in which an heir is not liable, then the vendor could proceed against the purchaser. 19. If, having accepted the inheritance, the instituted heir should lose servitudes, he can proceed by the action on sale against the purchaser for those servitudes to be restored to him. 20. But even if the vendor has not yet disbursed anything but is, under whatever head, obligated on account of the inheritance, he can still proceed against the purchaser.

3 POMPONIUS, *Sabinus, book 27:* If the vendor of an inheritance should, without bad faith or other fault on his part, lose money which he had exacted, it is certainly not the case that he will be liable to the purchaser.

4 ULPIAN, *Edict, book 32:* When a debt is sold, Celsus says in the ninth book of his *Digest* that subject to contrary agreement, the vendor is not answerable for the debtor's solvency but only for the fact that he is a debtor,

5 PAUL, *Edict, book 33:* indeed, even without the reservation, "subject to contrary agreement." But if he be stated to owe a specific sum, the vendor will be liable for that sum; if he be liable for a nonspecific debt or for nothing, he will be liable for the purchaser's damages.

6 PAUL, *Questions, book 5:* There must be made over to the purchaser of a debt the right to claim a pledge including one which the vendor later receives; for the vendor's benefit accrues to the purchaser's advantage.

7 PAUL, *Plautius, book 14:* When someone sells an inheritance, there must in fact be an inheritance for a sale to exist; for this is not the purchase of a chance as in hunting and the like; it is the sale of an existing thing, and if the thing does not exist, there is no sale, and the price, if paid, can be recovered by *condictio.*

8 JAVOLENUS, *From Plautius, book 2:* But if there be no inheritance which belongs to the vendor, in determining what he should make good to the purchaser, this distinction should be taken: If an inheritance indeed exists but does not belong to the vendor, its actual value is to be assessed; if there is none, the purchaser will recover from the vendor only the price and any expenses which he has incurred in the matter

9 PAUL, *Edict, book 33:* and any damages which he has sustained.

10 JAVOLENUS, *From Plautius, book 2:* But if, in the sale of an inheritance, it be agreed that whatever right the vendor has is sold and that there will be no liability for what may eventuate thereafter, then, although the inheritance does not belong to the vendor, he will be under no liability because the transaction was obviously such that,

just as any profit, so any loss arising from the contract would fall to the purchaser.

11 ULPIAN, *Edict, book 32:* For a sale is acceptable on the terms that "the inheritance, if there be one, is sold to you," in effect, the expectation of an inheritance; for the thing sold is uncertain in content as in the sale of the cast of a net.

12 GAIUS, *Provincial Edict, book 10:* This, however, is to be taken to hold good only if the vendor is unaware that he is selling what does not belong to him; otherwise, he will be liable for fraud.

13 PAUL, *Plautius, book 14:* But if there be an inheritance and the agreement be not that the purchaser shall receive whatever right the vendor has in it, then the vendor must vouch for his being heir; but, with the saving clause mentioned, the vendor will be absolved from any obligation, if the inheritance does not belong to him.

14 PAUL, *Edict, book 33:* One who sells debts of a son-in-power must also cede to the purchaser the rights of action which he has against the debtor's head of household. 1. If an inheritance be sold, the vendor must transfer the assets thereof, the size of the inheritance is irrelevant,

15 GAIUS, *Provincial Edict, book 10:* unless the vendor has represented its size.

16 PAUL, *Edict, book 33:* If you sell as heir an inheritance which, in fact, came to you under the *senatus consultum Trebellianum*, you will be liable for the purchaser's damages.

17 ULPIAN, *Edict, book 43:* We are in the habit of buying and selling conditional debts and those not yet due; for there is something to be bought and sold.

18 JULIAN, *Digest, book 15:* If one of several co-heirs, before the others accept the inheritance, pays all the money, which was due under penalty from the testator, and sells the inheritance and then can recover nothing from his co-heirs by reason of their poverty, he can alone lawfully bring proceedings on the stipulation or sale; that all the money was paid in respect of the inheritance is made plainer when the action to divide the inheritance is brought in which each can recover from his co-heirs no more than he has paid out as heir.

19 JULIAN, *Digest, book 25:* It is of great significance, when some conditional obligation is sold, whether it be sold as without qualification, although it is in fact conditional; if it be sold as conditional, there will be no sale; if the condition does not materialize, but, in the other case, the sale stands. For if Titius owes you ten under a condition and I buy his debt from you, I can sue at once on the purchase that you should release him.

20 AFRICANUS, *Questions, book 7:* If you sell me the inheritance of Lucius Titius and later become the heir of his debtor, you will be liable to me in the action on purchase. 1. This becomes the more evident in the event of a debtor becoming heir to his creditor and selling the inheritance.

21 PAUL, *Questions, book 16:* A vendor who had given a stipulation on account of an inheritance brought an action for a thing which was part of the estate, and sold it to another; the question is what he should make good on the stipulation; for the

stipulation cannot be twice brought in issue so that he is liable for both the thing and its value. We, indeed, believe that if, after the heir's selling the thing, the stipulation becomes operative, the price or value is comprised in the stipulation; but if the stipulation became operative first and the vendor then acquired the thing, he must deliver the thing. Now if he should sell a slave who dies, is he liable for the slave's price? For one who promises Stichus should not be liable in respect of Stichus's death in the event of his having sold Stichus, unless he be in wrongful delay in performing his obligations. But where I sell an inheritance and, subsequently, something which is part of it, it can be seen that I am dealing with that thing and not the inheritance. This, though, is not to be accepted in relation to a specific item. For if I sell you this slave and, before he is delivered, I sell him to someone else and receive the price, let us consider whether, on his death, I owe you anything in the action on purchase; assuming that I was not in delay in delivering him (for the price of a slave sold is accepted by virtue of the transaction, not the circumstances) and the case is such as though I had not sold to someone else; for I owed you the thing, not the right of action. But when an inheritance is sold, it is assumed that, whatever I do as heir, I must make good to the purchaser as if I were conducting his affairs; in the same way, good faith requires the vendor of land to account for its produce, if he ignores it as belonging to another; no liability attaches to him unless he be shown to have been at fault. But if I claim the thing that I have sold from another in possession of it and accept a money judgment in respect of it, am I liable to the purchaser for the thing or for its price? It is always the thing and not actions in respect of it for which I am liable. But if, being forcibly ejected or through the action for theft, I recover twofold the value of the thing, that in no way goes to the purchaser. Again, if the vendor, without fault on his part, ceases to possess the thing, he will have to make over his rights of action in respect of it, not the thing itself, and also the value placed upon it; for if a building be burned down, he must deliver its site.

22 SCAEVOLA, *Replies, book 2:* An inheritance was sold and the price paid in part; the purchaser not having paid the balance, the question was whether the assets of the inheritance constituted a pledge therefor. I replied that, on the case put, there was no reason why they should not be.

23 HERMOGENIAN, *Epitome of Law, book 2:* The vendor of a right of action, which he has against the principal debtor, must cede all rights accruing to him from the debts, not merely that against the principal but also those against that debtor's sureties, unless the parties have agreed otherwise. 1. The vendor of a debt must make over in full to the purchaser whatever he acquires by way of balancing of accounts or by demand.

24 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* You sold the inheritance of Cornelius; then, Attius to whom Cornelius had left a legacy away from you made you his heir, before he had taken his legacy from the purchaser of the inheritance. I think that you can validly proceed by the action on sale for the legacy to be given to you; for the inheritance is sold minus the legacy which the purchaser must discharge; and it matters not whether the money was due to Attius, who made you heir, as a creditor or as a legatee.

25 LABEO, *Plausible Views, book 2:* If an inheritance be sold, land therein being reserved, and the vendor subsequently acquire anything in respect of that land, he must make it over to the purchaser of the inheritance. PAUL: No, it must always be asked what was the intention of the parties; if that be not apparent, the vendor must make that thing over to the purchaser; for it is regarded as coming to him from the inheritance, no differently from if he had not reserved the land in selling the inheritance.

5

RESCISSION OF A SALE AND THE CIRCUMSTANCES IN WHICH A PURCHASE MAY BE DEPARTED FROM

1 POMPONIUS, *Sabinus, book 15:* Celsus the Younger was of opinion that if a son-in-power sold me something, part of his *peculium*, and it was further agreed that the sale might be resiled from, the agreement should be made between me, the son, and the head of household, with the provision that if I reached agreement with the head of household alone, the son cannot be released from his obligation; the question is whether such agreement affects nothing or whether I indeed am released but the son remains subject to an obligation; in the same way that if a *pupillus* should make an agreement without the *auctoritas* of his tutor, he himself would be released but not the person with whom he made the agreement. Aristo's statement that one party can remain under obligation is not correct because it is not possible to have a departure from a contract by one party only of those who contract. Hence, if the contract be renewed by one party, the agreement is not of any effect. It has, though, to be said that if the head of household make an agreement and the other party be released, the son-in-power too is indirectly discharged from his obligation.

2 POMPONIUS, *Sabinus, book 24:* If I buy something from you and then buy it from you again for an increased or reduced price, we abandon the first sale (for it is possible for us, by agreement, to nullify the sale, while the matter is still wholly executory) so that the later sale is operative as though the earlier one had never been made. But we cannot invoke the same reasoning where the sale is called off after the price has been paid, because, the price being paid, we cannot unmake a sale.

3 PAUL, *Edict, book 33:* Just as a sale and purchase is concluded by mere agreement, so it is resolved by contrary agreement, before anything has been done to implement it. It has, in consequence, been asked whether, assuming the purchaser to have taken a verbal guarantor or the vendor to have exacted a stipulation, the obligation is dissolved by bare agreement. Julian writes that anyhow the action on purchase will not lie, because defenses are inherent in actions of good faith; now we have to consider whether the defense is available to the guarantor; I myself think that if the person principally liable be released, the guarantor too is released. In the same way, should the vendor sue in the action on sale, he will be countered by the defense. The same rule of law applies if the purchaser makes the matter the object of a stipulation.

4 PAUL, *Notes on Julian, Digest, book 8:* If a purchase be effected of either a garment or a platter and the purchaser agree that the purchase of one of them no longer subsists, I think that the obligation is resolved in respect of that one only.

5 JULIAN, *Digest, book 15:* When the purchaser formally releases the vendor or the vendor the purchaser, this demonstrates the intention of each that the contract shall be resiled from and the position will be as if they had agreed that neither would claim anything from the other; but, obviously, in such cases, the release takes effect not of its own nature but as a manifestation of agreement. 1. A sale is discharged by bare agreement, if it be still wholly executory. 2. Where the slave has died, the sale is to be treated as though he had been delivered in that, the vendor being relieved of liability, the slave's death is at the purchaser's risk; hence, unless the parties have made some lawful agreement, the actions on sale and purchase remain available.

6 PAUL, *Edict, book 2:* If it be agreed that the thing sold shall be returned if it proves unsatisfactory within a given period, the action on purchase will lie, as Sabinus opines, or an *actio in factum* analogous to the purchase action will be given.

7 PAUL, *Questions, book 5:* If I buy again conditionally what I have already bought unconditionally, the second sale is without effect. 1. If there be a *pupillus* who first buys without, and subsequently with, the *auctoritas* of his tutor, then, although the vendor was already bound to him by the first sale, since the *pupillus* was not himself then under an obligation, the renewed sale has the effect of putting each under an obligation to the other; but if the *pupillus* makes the first purchase with his tutor's *auctoritas* and then buys again without it, the second contract is of no effect. The same issue arises if the *pupillus*, without his tutor's *auctoritas*, makes a pact for the abandonment of a sale; the situation should be as though he bought in the first place without such *auctoritas*, that is, that he personally is not bound, but, should he sue, the vendor will be able to make retentions. This is said not without reason; for the purchase was validly made in the first place; and it would scarce be compatible with good faith to uphold a pact which is detrimental to one party, especially if he had been deceived by excusable error.

8 SCAEVOLA, *Replies, book 2:* Titius, procurator to Seius, was Seius's heir on the latter's death; unaware of this, he endorsed as procurator a sale made by a slave of the inheritance. The question was whether, on learning the truth before the sale was executed, he could resile from the contract. My reply was that if he did not personally make the sale, Titius should not be liable to civil actions in respect of his endorsement of the slave's sale; but he would be liable to a praetorian action in respect of the slave.

9 SCAEVOLA, *Digest, book 4:* Land belonging to Lucius Titius was sold on account of taxes; but, when Lucius Titius, the debtor, declared himself ready to pay the tax in full, and since the price received for the land was less than the sum due, the governor of the province rescinded the sale and bade the land be restored to Lucius Titius. The question was whether the purchased land was part of the estate of Lucius Titius, after the governor's ruling, even before its actual restoration to him. The reply was: Not before the price had been repaid to the purchaser or, if he had not already paid, the tax debt had been settled.

10 SCAEVOLA, *Digest, book 7:* Seius bought land from Lucius Titius with a provision that if the price had not been paid by a given date, the sale would be off. Seius, having paid part of the price, found himself on the vendor's death appointed tutor with others to the vendor's sons below the age of puberty; he neither paid the money to his cotutors in accordance with the provision nor rendered an account of his tutelage. The question was whether the sale was nullified; the answer was that on the facts put forward, the land was unsold. 1. The purchaser of land, suspecting that Numeria and Sempronia would bring claims against him, made a pact with the vendor that he should retain part of the price until the vendor provided him with a verbal guarantor; the vendor later inserted a term that if the full price was not paid by a given date and the vendor wished there to be no sale of the land, the land would be unsold; in the meantime, the vendor was successful in proceedings with one of his female opponents and settled with the other so that the purchaser was beyond question possessor of the land. The issue was whether, no verbal guarantor having been given and the price not paid in full on time, as required by the terms, the land was unsold; the reply was that if the agreement was that the price should not be paid before a guarantor in respect of the sale was provided and this nonprovision of a surety was not the fault of the purchaser, the second part of the term cannot be enforced.

6

RISK AND BENEFIT OF THE THING SOLD

1 ULPIAN, *Sabinus, book 28:* If wine which has been sold goes sour or goes off in some other way, the loss is the purchaser's, as it would be if the wine were spilled, whether through the casks being staved or for some other reason. But if the vendor has undertaken the risk, he will sustain it for so long as he has undertaken it; if he has specified no period, then he bears the risk until the wine is tasted, wine, of course, being regarded as absolutely sold only when it has been tasted. Consequently, either it will have been agreed how long the vendor bears the risk in the wine or, in the absence of agreement, he will bear it until the wine is tasted. If it has not yet been tasted, then, even though the purchaser may have sealed the casks or jars, we must still say that the risk is on the vendor, unless the parties have made some other agreement. 1. The vendor is also liable for safekeeping until the date for measuring; for, prior to the measuring, it is as though the wine is not yet sold. But after the measuring out, risk ceases to rest on the vendor; indeed, he will be released from risk-bearing before any measurement, if he sold the wine not by measure but by the jar or individual cask. 2. Trebatius says that if the purchaser has sealed a cask, it is deemed to have been delivered to him, but Labeo correctly states the opposite; for sealing is deemed to be for the purpose of preventing substitution, not to indicate delivery. 3. Now the vendor may legitimately pour the wine away, if he has set a time for its measuring out and it is not measured within that period. He cannot, however, thus pour it away, so to speak, out of hand; he must first warn the purchaser, before witnesses, that he should remove the wine or realize that if he does not, the wine will be poured away. All the same, if he does not pour it away when he would be entitled to do so, he is to be commended; he can further charge rent for his casks, so long as he has an interest in the vessels which hold the wine being empty (as, for instance, if he would have let them out) or if he would have to hire other containers. It is, though, the more appropriate course for him to hire other containers and to hold back the wine until the purchaser pays him the rent thereof or else to sell the wine in good faith; in short, he should mitigate the purchaser's loss so far as he can without detriment to himself. 4. If you buy wine in the cask and nothing is agreed about its delivery, it is assumed that the intention was that the casks should be emptied before they are needed for the new vintage. If, though, they should not be so emptied, the vendor should follow the practice advised by the earlier jurists: Measure the wine through a wicker basket and pour it away. These earlier jurists advised this course for the purpose of measuring, assuming the amount to be unascertained, so that it might be apparent how much the purchaser has lost.

2 GAIUS, *Common Matters, book 2:* All this is true of a vendor who would not require the vessels except for the new vintage; but should he be a merchant who regularly buys and sells wine, the time to be looked to is that when removal can be made to the vendor's advantage. 1. Let us now consider the extent of the vendor's liability for safekeeping until the time of measuring out; is it absolute, so that he has to show diligence, or is he liable only for bad faith? I take the view that he has to display diligence but that unavoidable accident or great violence will excuse him.

3 PAUL, *Sabinus, book 5:* The vendor has to observe the same degree of diligence as does a person who borrows something for use and return; thus, he has to display greater care than he might show in his own affairs.

4 ULPIAN, *Sabinus, book 28:* If someone sells wine and specifies a date by which it is to be tasted and then prevents the tasting from being made, does he bear the risk of the wine's becoming sour or musty only for the period past or also after the specified date (so that, if the wine should chance to go off after the period for tasting has expired, the risk lies with the vendor); or is it the case that the sale is off (as having, in effect, been made subject to the condition, "that is, if the wine shall have been tasted before that date")? The issue will depend upon the parties' intention. For myself, I think that if that intention cannot be determined, it must be said that the sale holds good but that the risk remains with the vendor even after the period for tasting has expired, because he is at fault. 1. If a quantity of wine be sold for a lump sum, the vendor is liable only for its safekeeping. It will be apparent from this that if the wine be not sold with a provision for tasting, the vendor has no liability for acidity or mustiness and that all risk is on the purchaser. At the same time, it is hard to believe that anyone would buy wine without a proviso that it is to be tasted. Hence, if a period for tasting be fixed, the purchaser may taste when he can and, until he does taste, the risk of sourness and mustiness is on the vendor; for a specified period for tasting redounds to the purchaser's advantage. 2. When wine has been sold at a lump sum, the period of the duty of safekeeping ends with the removal of the wine. This, however, is to be taken in the sense that a period has been specified for the removal; if it has not, one has to consider whether the vendor's liability for safekeeping is of indefinite duration. The more correct view would appear to be that in accordance with what has been already said, either the issue is regulated by the parties' intention in the matter of time or the vendor proclaims to the purchaser that he should remove the wine; but certainly the wine should be removed before the vessels are required for the new vintage.

5 PAUL, *Sabinus, book 5:* If it be the purchaser's fault that the wine is not removed by the appointed time, the vendor is, thereafter, no longer responsible for it, unless there be any bad faith on his part. Suppose, say, that there be sold a hundred jars of that wine in that cellar, once it has been measured out; then, until such measuring, the risk is on the vendor, unless the purchaser be at fault.

6 POMPONIUS, *Sabinus, book 9:* If I buy wine, excluding that which is sour or musty, and it be to my advantage to accept even sour wine, Proculus says that even though the clause was for the purchaser's benefit, sour or musty wine still is not sold; for it would be unfair not to allow the vendor to sell to someone else what the purchaser is not obliged to accept.

7 PAUL, *Sabinus, book 5:* What accedes to land, after its sale, by alluvion, as also that which is lost, goes to the benefit or the detriment of the purchaser. Even if the whole field be inundated by a river after the sale, the risk is on the purchaser; he is, therefore, entitled to any benefit which may accrue. 1. What is sold should fall within the extent of the land unless it be the parties' intention that it should not. But what is not the object of sale should be comprised, only if there be agreement to that effect, as in respect of public roads, boundaries, and groves which adjoin the land. But when nothing is said either way, it should not be comprised. It is, in consequence, customary to provide that groves and public roads, lying within the land, are comprised in its extent.

8 PAUL, *Edict, book 33:* It is essential to know when a sale is perfect because we then know who bears the risk in the thing; for once the sale is perfect, risk is on the purchaser. And if the thing sold be identified, what it is, its nature, and quantity, the price be fixed, and the sale be subject to no condition, the sale is perfect. But if it be conditional and the condition not yet satisfied, there is no sale, any more than there would be a stipulation. If, though, the condition has been realized, Proculus and

Octavenus say that the risk is on the purchaser and, in his ninth book, Pomponius approves that view. And should either vendor or purchaser die while the condition is pending, it is settled law that, on the realization of the condition, their heirs will be liable, as though the sale were related back to the time of the initial agreement. If the thing has been delivered while the condition is still pending, the purchaser cannot proceed to usucapion of it as purchaser; and if the thing should cease to exist while the condition is pending, any price which has been paid will be reclaimed and fruits of the period of pendency belong to the vendor (conditional stipulations and legacies are similarly extinguished). Of course, if the thing still exists when the condition is satisfied but has deteriorated, it can be said that the purchaser bears the risk. 1. Should a sale be made on the terms, "be the slave bought, whether or not the ship comes from Asia," Julian is of opinion that the sale is perfect forthwith because it is certain that it has been contracted. 2. When you sell me a usufruct, it is important whether you merely sell me a usufruct which you enjoy or rather a usufruct in something which you own. In the first case, if you should die immediately, your heir will owe me nothing, but if you live and I die, the usufruct will be due to my heir; in the second case, nothing will be due to my heir, but your heir will be under an obligation to create the servitude.

9 GAIUS, *Provincial Edict, book 10:* The question is asked: If, after the land has been inspected but before the sale contract is made, trees on the land are blown down, do they have to be delivered to the purchaser? The answer is: "No." For they are not part of the purchase since they ceased to be part of the land before the sale was made. But if the purchaser was unaware, while the vendor knew, and did not advise him that the trees were blown down, the purchaser's interest in the matter is to be assessed, if the sale proceeds.

10 ULPIAN, *Disputations, book 8:* If it be agreed in a conditional sale that the thing shall be at the purchaser's risk, I think that the pact is valid.

11 SCAEVOLA, *Notes on Julian, Digest, book 7:* The purchaser cannot bring proceedings in respect of land if, before the estate has been measured, part of the land be lost by flooding, a landslide, or some other accident.

12 (11) ALFENUS VARUS, *Digest, book 2:* What is the legal position if a tenement which has been sold is destroyed by fire, since there cannot be a blaze without fault on someone's part? The reply was: This can happen without fault on the part of the head of household, and a master is not automatically at fault, if the blaze was caused by the negligence of his slaves, and so the vendor will not be liable for any mischance if he shows, in keeping the tenement safe, the diligence which would be displayed by honest and careful men.

13 (12) PAUL, *Epitome of Alfenus, books 3:* The aedile destroyed couches which had been bought and which were left in the street; if they had been delivered to the purchaser or if it was his fault that they had not been delivered, it is clear that the risk is on the purchaser

14 (13) JULIAN, *Urseius Ferox, book 3:* and he can bring an action under the *lex Aquilia* against the aedile if the latter acted wrongly; or, at any rate, he can proceed against the vendor by the action on purchase to require the vendor to cede to him such actions as the vendor might have against the aedile.

15 (14) PAUL, *Epitome of Alfenus, book 3:* But, if they have not been delivered and there has been no delay by the purchaser in taking delivery, risk will be on the vendor. 1. He replied that where materials purchased are lost by theft, risk is on the purchaser if they have been delivered, otherwise on the vendor; beams of timber are regarded as delivered if the purchaser has put his seal on them.

16 (15) GAIUS, *Common Matters, book 2:* When wine in casks is sold and it goes off

before removal by the purchaser, the vendor will be liable to the purchaser, assuming that he vouchsafed its quality; if, though, the vendor said nothing, the purchaser bears the risk because, if he has not tasted the wine or, tasting, injudiciously approves it, he has only himself to blame. Of course, if the vendor knew that the quality would not last until the date for removal and did not warn the purchaser, he will be liable to the purchaser for the latter's interest in being warned.

17 (16) JAVOLENUS, *From Cassius, book 7:* Suppose the purchaser of a slave to ask to hire him until the price has been paid; he cannot acquire anything through that slave because a slave who remains, through a contract of letting, in the possession of the vendor is not regarded as delivered. But the purchaser will bear the risk of anything which befalls the slave without bad faith on the vendor's part.

18 (17) POMPONIUS, *Quintus Mucius, book 31:* It should be known that once the purchaser is in delay, the vendor is no longer liable for negligence, but only for bad faith. But if both vendor and purchaser are in delay, Labeo writes that the delay should count against the purchaser rather than the vendor, but that it should be ascertained which was the later in falling into delay. For what if I give notice to the vendor and he does not give me the thing I have bought; and then, when he does offer it, I will not accept it? In such a case, certainly, it counts against me. But if the purchaser was in delay and then, before anything had been done, the vendor became guilty of delay, when it was in his power to perform, it is equitable that the later delay should count against the vendor.

19 (18) PAPINIAN, *Replies, book 3:* Rights of habitation having ended by the death of the freedmen enjoying them, the purchaser of a house will not on that account be liable to the vendor if their agreement was simply that in addition to the price, the rights should be granted to the freedmen in accordance with the wishes of their deceased manumitter. 1. If, before the price has been paid, proceedings are initiated over the issue of title to the thing, the purchaser does not have to pay the price, unless the vendor provides him with verbal guarantors of substance against possible eviction.

20 (19) HERMOGENIAN, *Epitome of Law, book 2:* If the purchaser is late in paying the price, he will have only to pay interest, not everything that the vendor might have gained if he had not been in delay; for instance, if the vendor was a trader and could have gained more than the amount of interest by his dealings.

7

SLAVES TO BE EXPORTED: THE SALE OF SLAVES WITH A PROVISION THAT THEY BE (OR NOT BE) MANUMITTED

1 ULPIAN, *Edict, book 32:* If a slave be sold with a provision that he shall not stay in some place, the vendor's position is such that he may waive the term and keep him at Rome. So Papinian, in his third book, replies: The term, he says, is observed for the vendor's security that he shall bear no risk.

2 MARCIAN, *Public Matters, book 2:* If a slave be sold to be exported from Italy, he can stay in a province, unless that be specifically prohibited.

3 PAUL, *Edict, book 50:* If someone sell a slave with a provision that he shall be manumitted within a given period, the slave will become free, though not in fact manumitted, so long as the vendor is of the same mind when the period expires; the sentiments of his heir would not be looked into.

4 MARCELLUS, *Digest, book 24:* If someone below the age of twenty sold you a slave and delivered him with a provision that you should manumit him, the delivery is of no consequence, even though the intention was that you should manumit him after the vendor had attained the age of twenty; for it is of little moment that the date of manumission should be deferred. The statute [*lex Aelia Sentia*] stands against the vendor's judgment which is insufficiently stable.

5 PAPINIAN, *Questions, book 10:* When a slave is, by agreement with his vendor, banned from the limits of any city, he is deemed banned also from Rome. This rule, which could, for the rest, be gleaned from imperial orders, also has its own inherent justification lest, obviously, one who lacks lesser things might enjoy those of more moment.

6 PAPINIAN, *Questions, book 27:* Suppose a vendor to have sold a slave-woman, extracting from the purchaser an undertaking that she will not be manumitted nor put to prostitution and, after some act contrary to this proviso, she is evicted or becomes free, and the penalty arising from the stipulation is claimed; there are those who think that the plaintiff may be met with the defense of fraud, though Sabinus denies this. But reason requires that the stipulation should not be binding at law if the provision be that there should be no manumission; for it is incredible that the parties should have deliberated upon the act of the manumitter and not on the effects of the benefit. But if the provision be that a slave-woman should not be put to prostitution, there is no ground on which the penalty should not be claimed and exacted; for the woman herself and the vendor's feelings are outraged, and, it may be, modesty is offended. Indeed, leaving aside the stipulation, it became accepted that the action on sale will lie if the purchaser acts or is guilty of an omission in contravention of a term of the sale. 1. It was at one time our view that an action on sale lay for a penalty in respect of a slave, only where the vendor had a pecuniary interest; say, a penal sum had been promised; but it is not appropriate to the good man to believe in the vendor's interest in the nonsatisfaction of the desires of a cruel man. On the contrary, I am attracted by the view of Sabinus who believes that an effective action on sale may be brought because the slave can be regarded as having been sold more cheaply on account of the provision.

7 PAPINIAN, *Questions, book 10:* A slave was sold with a term that he should not be in Italy, and should there be any contravention thereof, it was agreed without a stipulation that the purchaser should pay a penalty. It could scarce be the case that the vendor could validly take proceedings on that account, solely out of the desire to punish; he would have himself to be subject to a penalty to someone else, if the term of the sale was not observed. From this, it follows that he can sue to the extent that he is himself obliged to someone else; for anything more is a penalty, not a claim for the thing. But if it be agreed, as a punishment for him, that the slave shall not be exported, the vendor's wishes will validly ground an action. There is no contradiction in these two statements; for to confer a benefit on the slave is in his interest, but the wrath of a penalty, otherwise not obligatory, breathes only severity.

8 PAPINIAN, *Questions, book 27:* The following question was put: Suppose that someone sold his own slave with a provision that he should be manumitted within a certain period and subsequently changed his mind; the purchaser nonetheless manumitted the slave; would the vendor have any action on the sale? I replied that the action on sale was no more, on the manumission of the slave or on the vendor's change of mind.

9 PAUL, *Questions, book 5:* Titius sold a slave with a provision that if he remained at

Rome, he would be liable to seizure; the purchaser resold him with the same provision. The slave ran away from the second purchaser and remained at Rome. I ask whether he may be seized and by whom. I replied that where the slave runs away, there is no doubt that there has been no breach of the provision because he cannot remove himself from his master's ownership; and a runaway slave does not remain. But if the slave remained with the second purchaser's consent in breach of the provision, the vendor who originated the provision is to be held to have the stronger position; the second vendor repeats the term by way of notice to his purchaser and to free himself from any liability, and he can in no way usurp the term from his own vendor whose conditions have now been satisfied; if he had promised a penalty, he will be liable, even though he also took a stipulation on resale. For the promised penalty, there will be two actions; but only the slave can be seized. If, though, the first vendor provided that if the slave-woman sold should be put to prostitution, she should be free, while the second vendor provided that in such an event, she should be seized, the freedom provision prevails over that for seizure. Of course, if the seizure provision was in the first and the freedom term in the second sale, she is, taking the more favorable interpretation, to be free, because each term is attached to a slave, and, like seizure, freedom removes the wrong done.

10 SCAEVOLA, *Digest, book 7:* In selling Pamphila and Stichus, the vendor inserted into the contract an agreement that neither Pamphila nor Stichus, who were sold at a reduced price, should be in slavery to anyone but Seius, and that on the latter's death, they should become free forthwith. The question was asked whether those slaves concerning whom an agreement was made between vendor and purchaser were freed by operation of law on the death of the purchaser. The reply was that in accordance with a ruling of the deified Hadrian on this matter, Pamphila and Stichus, the subjects of the question, will not be free unless they are manumitted. CLAUDIUS: The deified Marcus ruled in his six-monthly report that where there is a sale provision for liberty, slaves, although not manumitted, will be free, though the vendor provided for liberty at the purchaser's death.

BOOK NINETEEN

1

THE ACTIONS FOR SALE AND PURCHASE[1]

1 ULPIAN, *Sabinus, book 28:* If something is sold and not then delivered, an action lies for the interest, that is, the buyer's interest in having the thing. Sometimes this amount exceeds the price, as when his interest is greater than the object's value or the price paid for it. 1. If the seller concealed a servitude which he knew was owed, he will not escape an action on the purchase unless the buyer was also aware of this fact; anything done contrary to good faith comes under the action on purchase. But the seller is considered to conceal it knowingly not only if he failed to warn the buyer but also if he denied that the servitude was owed when the buyer asked. Now suppose that he said expressly: "No servitude is owed, but I am not liable for one's coming to light unexpectedly"; in my view, he is liable on the purchase if a servitude was owed and he knew it. But if he acted so as to prevent the buyer from knowing that a servitude was owed, I consider him liable on the purchase. My general view is that he should be liable if he behaved reprehensibly in concealing a servitude, but not if he only wished to protect himself against liability. These rules hold if the buyer was unaware of the servitudes; a person who knows of them is obviously not deceived, nor need he have been informed if he was aware of them already.

2 PAUL, *Sabinus, book 5:* There is an action on the purchase if a quantity that was specified in a purchase is not provided [by the seller]. 1. Vacant possession is not construed as being delivered if a third party is on it to safeguard legacies or *fideicommissa,* or if creditors take possession of the [seller's] property. This same rule should apply if "the womb" is in possession; the expression "vacant" is relevant in this case as well.

3 POMPONIUS, *Sabinus, book 9:* The possession which the seller should create is of such a kind that possession is not construed as having been delivered if a third party takes away this possession by legal process. 1. If the buyer stipulated that vacant possession be delivered and then sues on this stipulation, the fruits will not be covered by this action; when someone has stipulated that a farm be handed over, he is considered to stipulate that delivery of vacant possession should take place as well, but the duty to deliver the fruits is not covered by this stipulation, nor on the other hand, should the stipulation be enlarged. But [a jurist thinks that] there remains an action on purchase for furnishing the fruits. 2. If I purchase a right of way through your farm whether in person or with cattle or to transport or to channel water, delivery of vacant possession is meaningless; and so you should give a *cautio* that it will not be you who is responsible for my not using it fully. 3. If the seller of wine is responsible for a delay in its delivery, he should be condemned to pay whatever is higher: the value of the wine either at the time of its sale or when judgment is given; and whatever is higher: its value either at the place of sale or where action is brought. 4. But if the buyer is responsible for the delay, the price should be assessed at what it is when the action is brought in whichever place it is lower. Delay on the buyer's part is considered to occur if no obstacle prevents the seller's delivery, and especially if he held himself ready to deliver at any time. Further, it is not the prices at the place where action is brought that must be noted, but rather those current where the wine must be delivered; thus, wine bought "as from Brundisium" must be delivered at Brundisium even though the sale was concluded elsewhere.

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1. *Note on terminology.* Sale is a bilateral contract in which merchandise (often *merces*) is exchanged for a money price (*pretium*); the contract is between a seller (*venditor*) and a purchaser or buyer (*emptor*), who have reciprocal actions on sale (*ex vendito*) and on purchase (*ex empto*), respectively. If the seller warrants title, he is termed the *auctor.*

4 PAUL, *Sabinus, book 5:* If you sell me a slave whom you know to be a thief or a wrongdoer and I am unaware of this fact, then even though you promise double, you are liable to me on the sale for the amount of my interest in having known. I cannot sue you on the stipulation about this matter until something of mine is gone. 1. If the measurement of farmland is found to be smaller [than specified], the warrantor of title is obligated proportionately to the number of *jugera*; the reason is that should the area be discovered to be smaller, it is impossible to estimate the quality of land which does not exist. The seller can be sued not only if the area of the entire farmland is smaller but also with respect to its parts, for example, if it was specified that there be so many *jugera* of vineyard or oliveyard and less should be found; in these cases, calculation will be proportionate to the quality of the land.

5 PAUL, *Sabinus, book 3:* If an heir was compelled by the will to sell something [to someone] and he does so, he can be sued either on the purchase or on the will concerning other things which necessarily arise from the purchase. 1. But if he sells in the false belief that he was compelled to sell, then the ruling is that he cannot be sued on the purchase since the plaintiff can be defeated by a defense of fraud. Likewise, if he had promised to give in the false belief that he was compelled to give, he would defeat the plaintiff [in an action on stipulation] with the defense of fraud. Pomponius says that he can bring a *condictio* for an indefinite amount in order to be discharged.

6 POMPONIUS, *Sabinus, book 9:* The seller is liable on the purchase even if he is unaware that the area of the farm is smaller [than specified]. 1. If I sold you a building in exchange for a fixed sum of money plus your promise to repair another building of mine, I may sue on the purchase to force this repair; but if our agreement was only that you repair it, a contract of sale is not construed as having been made. Neratius wrote this as well. 2. But if I sold and delivered a lot to you in exchange for a fixed sum of money plus your promise to deliver half of it back to me after a building is constructed on it, the correct position is that I can sue on the sale to force both construction and the redelivery to me after construction. It is generally held that I have a suit on the sale as long as some portion of the object of sale has remained with you. 3. If you buy a burial ground and the seller constructs too close to it before a corpse is interred there, you can have recourse against him. 4. If you sell me a vessel with the specification that it has a definite capacity or is of a definite weight, I may sue on the purchase if you fall short. But if you sell me a vessel with the assurance that it is sound and it is unsound, you will be held responsible to me also for what I lose on this account; however, if we did not arrange that you be held responsible for its soundness, [a jurist held that] you should be held responsible only for bad faith. Labeo thinks the opposite, that the sole valid rule is that a sound vessel be provided in every case unless the parties arranged otherwise; his view is correct. Minicius reports Sabinus's response that this is the standard also for leased storage jars. 5. If I sold you a right of way in person, you can name me as warrantor of title only if you, in fact, own the farm for which you wish to acquire the servitude. It is unfair that I be liable if you cannot acquire a servitude because you are not the owner of the neighboring farm. 6. But if I sold you a farm with the specification that a right of way in person would accede to the farm, I will be completely liable for the right of way, because I am obligated on the theory that I am the seller of two things. 7. If a son-in-power sold and delivered something to me, he will be liable just as the head of a household. 8. If the seller has done something in bad faith as regards the object of sale, the buyer has an action on the purchase concerning this; bad faith should also be evaluated in this action, in order that the seller be held responsible to the buyer for what he promised to perform. 9. If the seller knowingly sold something that was under obligation [as a pledge] or belonged to a third party, and there was a clause "that he not be held responsible for this," his bad faith should [nonetheless] be assessed; bad faith must never occur in an action on purchase because the action is one of good faith.

7 POMPONIUS, *Sabinus, book 10:* In selling to me a farm while reserving the usufruct, you stated that the usufruct belonged to Titius, although it would, in fact, remain with you. If you undertake to claim this usufruct as your property, I have no possible recourse against you so long as Titius lives and does not assume a legal status such that he would lose the usufruct even if it were his; but in that case, that is, if he undergoes change of civil status or he dies, then I do have possible recourse against you the seller. The rule is the same if you specify that the usufruct belongs to Titius when it belongs to Seius.

8 PAUL, *Sabinus, book 5:* If I deliver to you an unencumbered property when I ought to deliver a servient one, I have a *condictio* for an undetermined amount in order to force your accepting imposition of the servitude it owed. 1. But if in the delivery I make a property servient when I should have delivered it to you unencumbered, you will have an action on the purchase for release from this servitude you ought not to endure.

9 POMPONIUS, *Sabinus, book 20:* If the buyer of stones from a farm declines to take them away, he can be sued on the sale to force his removal of them.

10 ULPIAN, *Sabinus, book 46:* It is not unusual for two obligations concerning the same object to coalesce in the same person. When a man who held a seller under obligation to him becomes heir to another who also held the seller under obligation, it is settled that there are two actions coalescing in the same person, namely his own action and the inherited one, and that the person designated heir, if he wishes to have the advantage of two actions separately, should sue the seller through his own action before taking up the inheritance, and through the inherited one after doing so; if he first takes up the inheritance, he can bring just one action, but such that through it he feels the advantage of both contracts. Conversely, if a seller becomes heir to a seller, he obviously should be held responsible for two evictions.

11 ULPIAN, *Edict, book 32:* The buyer has the action on purchase. 1. The first point to be noted is that included in this action is only what the parties agreed to be held responsible for. This is an action of good faith, and nothing better conforms to good faith than that the contracting parties be held responsible for what they arranged. But if nothing was agreed on, then they are held responsible for the duties naturally inhering in the scope of this action. 2. And in the first place, the seller must provide the object itself, that is, deliver it. If the seller was its owner, his act [of delivery] makes the buyer the owner also; if he was not, his act obligates the seller only for an eviction, provided that the price was paid or security was given for it. By contrast, the buyer must make the seller owner of the purchase-money. 3. Both Labeo and Sabinus think that redhibition is also covered by the action on purchase, and I agree. 4. The seller of animals ought also to give a *cautio* that they are presented in sound condition. The seller of beasts of burden usually promises that "they feed and drink properly." 5. If a man thought he was buying a virgin when in fact a mature woman was sold, and the seller knowingly let him persist in his error, [a jurist believes that] this reason does not justify a redhibition, but that an action on purchase does lie to undo the purchase; the woman should be returned after the price is repaid. 6. A purchaser of wine gave a fixed amount of money as an earnest; later the parties had agreed that the sale was void. Julian says that there can be an action on purchase to force return of the earnest; the action on purchase is available also for dissolving the sale, so he says. My question is: If a ring was given as an earnest and the ring is not returned after the sale was carried out, the price having been paid and the object delivered, under what action may suit be brought? Should a *condictio* be brought on the theory that it was given for a reason which has now lapsed, or should there be a suit on the purchase? Julian would likewise say there can be an action on the purchase; but a *condictio* will also be possible since the ring is in the seller's hands without a reason. 7. Neratius says that the seller must be held responsible to the buyer that a slave is not a runaway, even though he sells him without knowledge of this. 8. Neratius further says it is universally accepted that even if you sell a slave belonging to someone else, you should be held responsible for his being free of thefts and wrongdoings; there is an action on the purchase to force a *cautio* for the buyer's quiet possession, but also to force delivery of possession to him. 9. He also says that if he fails to deliver, he is condemned to pay the amount of the [buyer's] interest; and if he does not give security [against eviction], then to the maximum amount a warrantor of title stands to lose. 10. Neratius also says that for all these matters it suffices that he be held responsible for the maxi-

mum; this means that in subsequent actions damages are assessed after deduction of any amount previously paid. 11. He correctly adds that if he does not provide any of these things, condemnation should be made without deduction when other things then occur. 12. In the second book of his *Replies*, he says that a buyer condemned in a noxal action can recover, in an action on purchase, the lowest amount he was able to get off with. He thinks the same is true if he sues on a stipulation; and whether or not he should defend in a noxal action, nonetheless he can sue either on the stipulation or on the purchase because it was clear that the slave was a wrongdoer. 13. Neratius says further that in delivering an object, the seller should be held responsible for the buyer's prevailing in a suit for possession. But Julian, in the fifteenth book of his *Digest*, argues that there is obviously no delivery if the buyer would not prevail as to possession; so unless this is provided, there will be an action on purchase. 14. Cassius says that when a man receives damages on a stipulation for double, he can obtain nothing [more] for the other matters customarily covered by *cautiones* in sales. 15. Julian thought that an action on purchase should be brought if a stipulation for double was not made. In the tenth book of *From Minicius*, he says that if a man sells a slave on the condition that within thirty days he will promise double but that thereafter he has no responsibility, and the buyer does not seek to have this done within the time limit, the seller is nonetheless free of liability only if he sold another's slave unknowingly; and in that case, he is liable only for himself and his heir's letting the buyer have quiet possession. If he sold another person's slave knowingly, he is guilty of deceit, Julian thinks, and so he will be liable in an action on purchase. 16. I believe that Julian's view is exactly right also for pledges. If a creditor makes a legal sale [of a pledge] and the buyer is then evicted from the thing [by its owner], in an action on purchase the creditor is not liable even to return the price; this is laid down in many constitutions. Of course, the seller will be held responsible for deceit; indeed, he even counterpromises about deceit. But again, if he does not counterpromise, but knowingly sells a thing not obligated to him [as a pledge] or not belonging to the person who obligated it, he will be liable on purchase because we have shown that he should be held responsible for deceit. 17. If a man sells a thing and says that something else will go with it, all the rules which we laid down for the object of sale should be followed here too; but as to eviction he is not liable for double, but is obligated only that the buyer have quiet possession, not only as against himself but as against the world. 18. What responsibility should a person have if he sells "quiet possession"? I think there is a considerable difference whether he promises no disturbance of possession by himself and his descendants or by anyone. If the former, he evidently is not held responsible for eviction by a third party; hence, in the event of an eviction, he will not be liable on a stipulation if they concluded a stipulation, nor on the sale if they did not conclude one. But Julian, in the fifteenth book of his *Digest*, writes that even if the buyer expressly declares that neither he nor his heirs will disturb [the buyer's] possession, it may be affirmed that although he is not liable on the sale for the buyer's interest, he nonetheless is liable for return of the price. He goes on to say that this holds true even if it is expressly specified in the sale that there is to be no responsibility for eviction; after an eviction he owes the price but not the [buyer's] interest. A contract of good faith does not permit an agreement that the buyer lose the object while the seller retains the price. But perhaps, Julian continued, someone might interpret all the agreements described above as analogous to those in which it is permitted for a seller to receive payment even though the buyer receives no merchandise, for example, when we buy from a fisherman the future haul of his net or from a hunter the catch from setting his snares or from a fowler his entire capture; even if he captures nothing, the buyer still has a duty to pay the price. But in the agreements described earlier, the opposite should hold true, except if he sells someone else's property

knowingly; for according to Julian's opinion, which I reported above, we must then hold him liable on the sale because he acted deceitfully.

12 CELSUS, *Digest, book 27:* If I purchased the haul of a net and the fisherman then refused to cast his net, the indefinite value of this thing should be calculated; but if he refused to give me the fish he landed, then what he landed ought to be calculated.

13 ULPIAN, *Edict, book 32:* Julian, in the fifteenth book of his [*Digest,*] distinguishes between the knowing and unknowing seller with regard to condemnation in an action on purchase. He says that if he acted unknowingly in selling a diseased herd or an unsound timber, then in an action on purchase he will be held responsible for the difference from the smaller amount I would have paid had I known of this. But if he knew but kept silent and so deceived the buyer, he will be held responsible to the buyer for all losses he sustained due to this sale. Therefore, if a building collapsed due to the timber's unsoundness, he must make good the building's calculated worth; if herds die through contagion from the diseased herd, he should be held responsible for the interest in this not having occurred. 1. Again, if someone knowingly sold [a slave who is] a thief or a runaway, he should be held responsible for the buyer's interest in not being deceived. If he sold unknowingly, then in the case of a runaway he is liable for the difference from whatever less he [the buyer] would have paid had he known him to be a runaway; in the case of a thief he is not liable. The reason for the distinction is that it is not permitted to hold a runaway and the seller is thus liable just as if for eviction; we can hold a thief. 2. My expression "the buyer's interest in not being deceived" covers many things, for example, if he instigates others to flee with him, or makes off with property. 3. But what if he [the seller] did not know he was a thief, but sold him for a higher price by asserting he was of good character and faithful, is he liable on the purchase? I would think him liable. True, he did not know; but he should not have lightly asserted what he did not know. Between this man and one who knew [but kept silent there is slight difference; the one who knew] should give warning about a thief, while the former should not be prone to rash assertion. 4. If a seller acts deceitfully in order to sell something at a higher price, for example, if he lied about a slave's skills or his *peculium,* [a jurist thinks] he is liable on the action of purchase to make good to the buyer the difference from the higher amount he would have paid if his *peculium* or skills had been as claimed. 5. Conversely, Julian describes this case: Terentius Victor had died leaving his brother as heir; a certain Bellicus stole some assets, both equipment and slaves, out of the inheritance, and by consequence of these thefts he easily persuaded [the heir] to sell the inheritance to him on the theory it was worth very little. Can he be held liable in an action on sale? Julian says that the action on sale lies for the inheritance's additional worth had its assets not been stolen. 6. Julian further pointed out that the seller is also ordinarily held responsible for his deceit in a case of the following kind: The seller knew that a farm owed land rents to several municipalities; in the record of sale he wrote that the obligation was to just one municipality, and then set down a clause that "if anything had to be provided in the way of tribute or land rent or impost or as a road levy, it was the buyer's duty to give, do, and provide this." He is liable on the purchase, the theory being that he deceived the buyer. This view is correct. 7. But since, in fact, it was alleged that tutors had acted thus in selling the property of a *pupillus,* he [Julian] says there is a problem concerning whether a *pupillus* should be held responsible for the deceit of his tutors. If the tutors themselves made the sale, there is no doubt they are liable on the purchase. But if the *pupillus* made the sale on their authorization, he is liable to the extent that he was enriched by this act, while the tutors are to be condemned to pay the remainder and without time limit, since [liability for] the tutors' deceitful act is not shifted to the *pupillus* when he comes of age. 8. When an action is brought on purchase, the buyer

should tender the price. Therefore, even if he should tender part of the price, there is not yet an action on purchase; for the seller can keep the object of sale as a sort of pledge. 9. But suppose that part of the price was paid and the object was delivered but then lost through eviction: In a suit on the purchase, can he obtain the entire price of the object or only what he paid? I think the better view is that which he paid, because of the defense of fraud. 10. The settled view is that if farmland was sold when the crops were ripe, the crops also pass to the buyer unless the parties agreed otherwise. 11. If farmland was under lease, the rental payments clearly go to the lessor [the seller]; so too for urban property, except if it is alleged that the parties came to an express agreement. 12. But again, if some further harm befell the object of sale, the action must be ceded to the buyer, for example, the action for threatened damage or for warding off rain water or the Aquilian or the interdict against force or stealth. 13. Further, the buyer will be owed any profit from the labor of slaves or from the fares for beasts of burden or for ships, and likewise any addition to their *peculium* except what [derives] from the seller's property. 14. Titius sold a farm measuring ninety *jugera*; in a clause of the purchase it was stated that the farm is one hundred *jugera*. Before the measurement is verified ten *jugera* accrue to it by alluvion. I like Neratius's opinion; he thinks that if he sold knowingly, the action on purchase lies against him even though the ten *jugera* accrued; for he acted deceitfully and his deceit is not exculpated. But if he sold unknowingly, the action on purchase does not lie. 15. If you sold someone else's farm to me and it then became my property without my paying for it, I still have the action on purchase against you. 16. I think that there is responsibility not just for deceit, but also for fault, with regard to things that are ordinarily provided along with the object of sale. Thus, Celsus, in the eighth book of his *Digest*, wrote that when the parties agree that the seller will collect overdue rent and provide it to the buyer, he should be held responsible not just for deceit, but also for fault. 17. In the same book, Celsus also describes this case: You sold your share of a farm of which you and Titius were co-owners; but before you delivered it, you were forced to undergo an action for dividing common property. If the farm was awarded to your partner, you will be held responsible to the buyer for what you received for it from Titius. But if the entire farm was awarded to you, he says you will deliver it in its entirety to the buyer, but with the proviso that he pay the amount you were condemned to pay Titius on this score. However, as to the part which you sold, you should give a *cautio* against eviction, but as to the other part only a counterpromise against bad faith; for it is right that the buyer be in the same state he would have been in if the action for dividing common property had been brought against him. If the judge in dividing the farm set boundaries between you and Titius, you should obviously deliver to the buyer the part awarded to you. 18. If the seller gave something to a slave who was sold but not yet delivered, this too should be delivered. This is true also for inheritances and any legacies acquired through the slave; no distinction should be made concerning in whose favor they were left. What the slave provides to the seller through his labor should also be returned to the buyer, unless by agreement the day of delivery was postponed so that the seller might have the slave's labor. 19. The seller has the action on sale to obtain whatever the buyer ought to provide to him. 20. The following matters are included in this action: First of all, the price for which the object was sold; next, after the day of delivery, interest on the price, since it is entirely equitable that the buyer pay interest on the price after he enjoys the object. 21. We should

understand possession to be delivered even if the possession is on *precarium*; the sole criterion is whether he has the opportunity to gather fruits [from it]. 22. By an action on sale, he also recovers his expenditures on the object of sale, for example, any outlay on buildings that were sold; Labeo and Trebatius write that there is an action on sale for this. And likewise, if before delivery money was spent for care of a sick slave or if something [was spent] for training which it was probable the buyer wished to be spent. Labeo states further that if something was spent for the funeral of a dead slave, it too can be recovered by a suit on sale, provided that he did not die due to the seller's fault. 23. Likewise, if, when an object is sold, the parties agree that the buyer provide a sufficiently wealthy surety, an action on sale can force this being done. 24. The buyer and seller of land had agreed that if the buyer or his heir sold the property for a higher price, he would give half the profit to the seller. The buyer's heir sold the land for a higher price; [a jurist ruled that] in an action on sale, the seller would obtain his share of the higher price. 25. If a procurator sells and gives a *cautio* [against eviction] to the buyer, should an action be given both to and against the owner [the procurator's principal]? Papinian, in the third book of his *Replies*, thinks the owner can be sued on the purchase in an action analogous to the model of the action for a business manager's conduct, provided that he mandated the object's sale. Therefore, conversely it should be ruled that the owner has an analogous action on the purchase. 26. In the same book, Papinian reports his response that if the parties agree to the seller's being owed double if the price is not paid on time, this special clause is evidently an evasion of the imperial constitutions because it exceeds the statutory rate of interest; he says that the situation is different with a clause allowing rescission, since in this case, as he observes, they do not arrange for illegal interest but merely attach an unobjectionable clause to the contract. 27. If a man buys from my procurator in collusion with him, can he then sue on the purchase? I think he can, [but only] to the end of my either holding to or rescinding the purchase. 28. Again, if someone cheats a *minor* less than twenty-five years old, we will accord him an action on the purchase to the same extent specified in the previous case. 29. If a man buys from a *pupillus* without his tutor's authorization, a contract arises on one side only; the buyer is obligated to the *pupillus*, but does not obligate the *pupillus* to himself. 30. If the seller reserves a right of occupancy so as to allow his urban tenant to continue residence or his tenant farmer to enjoy for a fixed term, Servius thought it the better position that there is an action on sale; and hence, Tubero says that if this tenant farmer does damage, then by suing on the purchase the buyer can force the seller to sue the tenant on the lease and then to return to the buyer whatever he obtains. 31. When a building is sold or legated, our practice is to say that those things belong to the building which are held as part of the building or on account of the building, like wellheads,

14 POMPONIUS, *Quintus Mucius, book 31:* that is, the covering for a well,

15 ULPIAN, *Edict, book 32:* water receptacles, basins, and fountains. Also part of a building are the pipes joined to its fountains, even though they run out far beyond the structure; likewise, the water channels. But fish which are in a pool are not part of a building or a farm,

16 POMPONIUS, *Quintus Mucius, book 31:* no more than the chickens or other animals on a farm.

17 ULPIAN, *Edict, book 32:* Nothing is part of a farm except what is attached to the soil. But it must not be forgotten that many parts of a building are unattached to it, for example, door bars, keys, and locks; while many buried things are not considered part of a farm or farmhouse, for example, the wine receptacles in a pressroom, which, even though they adhere to the structure, belong rather to the equipment. 1. But it is settled that both wine and gathered crops are not part of a farmhouse. 2. When a farm is sold or legated, the dung heap and the straw beds belong to the buyer and the legatee; but wood belongs to the seller or heir because it is not part of the farm even if acquired for its use. In the case of dung heaps, Trebatius rightly distinguishes: If it was acquired to manure farmland, it follows the buyer; if to be sold, the seller, unless something different was arranged. It makes no difference whether it lies in a stable or forms a pile. 3. Painted pictures which are inserted as wall decoration are part of a building, and likewise marble revetments. 4. Netting around columns, cupboards on walls, and Cilician awnings are not part of a building. 5. Likewise, as to what was procured for an apartment building: If it was still unfinished even though physically inside the structure, it is not considered a part of the building. 6. If "things dug and things cut" are reserved in a sale, the settled view is that "things dug" are what is dug out, like sand, chalk, and so forth; "things cut" are things like felled trees, charcoal, and so forth. Aquilius Gallus, whose view is reported by Mela, correctly says that it is useless to make provision through a sale clause for "things dug and things cut," since if they are not expressly included in the sale there can be an action for their production; the seller need no more make provision for cut timber or quarry stone or sand than for other more valuable things. 7. Labeo writes that in general things inside structures for permanent use are part of the structure, but things there temporarily are not part of the structure. For example, pipes in place temporarily are not part of the building, but if they are permanently in place, they are part of the building. 8. It is settled that lead cisterns, wells, coverings of wells, and water cocks that are [either] soldered to pipes or covered by earth although not attached, are part of a building. 9. Likewise, it is settled that figurines, as well as columns and masks, from whose muzzles water often gushes out, are part of a villa. 10. Things which were removed from a structure for eventual return are part of the structure; but things which were procured for implacement are not part of the structure. 11. Props procured for a vineyard are not part of the farm before they are set up; but those removed with the intention that they be set up again are part of the farm.

18 JAVOLENUS, *From Cassius, book 7:* Granaries, which are normally made of planking, are part of a building if their posts are buried in the earth; but if they rest on the surface, they fall in the category of "things dug and things cut." 1. Rooftiles that are not yet placed on structures, even though they were assembled for use in covering, are considered as "things dug and things cut." The rule is different for those removed for eventual return; they belong to the building.

19 GAIUS, *Praetor's Edict, Chapter on Tax Farmers:* Republican jurists used terminology indiscriminately in sale and purchase.

20 GAIUS, *Provincial Edict, book 21:* Likewise, in lease and hire.

21 PAUL, *Edict, book 33:* If a man sells [before its birth] the offspring of a slave-woman who is barren or more than fifty years old and the buyer does not know this, the seller is liable on the purchase. 1. If the seller of land knows of [its liability to] tribute and does not declare this, he is liable on the purchase; but if he does not declare this out of ignorance, for example, because the land was in an inheritance, he is not liable. 2. Although I stated above that there is a purchase when we agree as to the object but disagree about one of its properties, the seller should still be liable for the [buyer's]

interest in not being cheated, even if the seller is also ignorant, for example, if he buys tables in the belief they are citron wood when they are not. 3. When the seller is responsible for nondelivery of an object, every benefit to the buyer is taken into account provided that it stands in close connection with this matter. If he could have completed a deal and made a profit from wine, this should not be reckoned in, no more than if he buys wheat and his household suffers from starvation because it was not delivered; he receives the price of the grain, not the price of slaves killed by starvation. An obligation does not increase because it is carried out slowly, although it would grow greater if wine were worth more today, and rightly so; for if the wine had been delivered, I as buyer would have it, and if not, that which should have been delivered previously is due now. 4. If I sell you a farm with the condition that I have it under hire for a fixed sum, I have an action on sale about this, on the theory that the arrangement was part of the price. 5. Again, if I sell you a farm on the condition that you sell it to no one other than me, there is an action on sale about this if you sell it to someone else. 6. The seller of a house withheld for himself the right of occupancy for as long as he lived or ten per year instead. In the first year, the buyer preferred to pay the ten, in the second year to proffer the right of occupancy. Trebatius says that he has the power to change his mind, and each year he can offer either one; so long as he was ready to offer one or the other, there are no grounds for action.

22 JULIAN, *Digest, book 7:* If the seller has misrepresented the condition of a farm but not its measurements, he is still liable to the buyer; for example, suppose he said there were fifty *jugera* of vineyard and fifty of meadow, and the meadow is found to be larger but there are one hundred *jugera* in all.

23 JULIAN, *Digest, book 13:* If a man sold a slave along with his *peculium*, but then manumitted him [before delivery], he is liable not just for the *peculium* which the slave had at the time of manumission, but also for the things he acquires afterward; furthermore, he ought to give a *cautio* that whatever he receives in inheritance from his freedman will be returned. MARCELLUS adds: The seller in an action on purchase should provide what the buyer would have if the slave had not been manumitted; those things he would not have acquired if there had been no manumission are not covered.

24 JULIAN, *Digest, book 15:* If a slave in whom you had a usufruct buys a farm and you then undergo change in civil status before the money is paid, because of this change in civil status, you will have no action on the sale, even though you pay the price; but you will have an action for unowed money against the seller. But [if payment occurs] before the change in civil status, it makes no difference whether you pay yourself or your slave does so from a *peculium* belonging to you; in either case, you will have an action on the sale. 1. Unknowingly and in good faith, I purchased from a thief a slave belonging to you; the slave then purchased out of a *peculium* belonging to you a man who was delivered to me. Sabinus said that you can bring a *condictio* against me for this man, but that if I lost anything in the transaction which he arranged, I will have a counteraction on the *peculium*. Cassius reported the opinion of Sabinus, which is correct and is my view as well. 2. When a slave sells a man, the verbal guarantor of the sale should be held responsible for everything for which he would be obligated had he given a verbal guarantee on behalf of a freeman. An action is also given against the [slave's] master, whereby the buyer obtain everything which should have been obtained were a freeman the seller, but the master's liability is limited by the *peculium*'s value.

25 JULIAN, *Digest, book 54:* The buyer of grapes on the vine, if he should be prevented by the seller from gathering the grapes and then sued for their price, may employ against him the defense "unless the money in question is sought for something sold and not delivered." However, if after delivery he should be forbidden to tread the crop of grapes or to take away the unfermented wine, he may bring an action for production or for insult, just as if he were forbidden to take away any other property of his.

26 ALFENUS VARUS, *Digest, book 2:* If a man in selling his farm had stated that one hundred storage jars allegedly on the farm would go along with it, he will owe these storage jars to the buyer even though no storage jar was in fact there.

27 PAUL, *Epitome of Alfenus, book 3:* Whatever the seller says will accompany the object of sale must be delivered whole and sound; for example, if he said that storage jars would accompany a farm, he should provide sound ones, not broken ones.

28 JULIAN, *Urseius Ferox, book 3:* You sold property to me and we agreed that I do some action; I promised [by stipulation] a penalty if I did not do it. He [Urseius] responded: Before the seller claims the penalty on the stipulation, he can sue on the sale. If he obtains as much as was stipulated for as penalty, the defense of fraud will defeat him if he sues on the stipulation. If you obtain the penalty [by suing] on the stipulation, through the same rule you will be able to sue on the sale only for his additional interest in the action being done.

29 JULIAN, *From Minicius, book 4:* An object was legated to someone under a condition; he then bought it unawares from the heir. By an action on purchase, the buyer can recover the price, since it is not because of the legacy that he has the object.

30 AFRICANUS, *Questions, book 8:* You purchased from me a slave along with his *peculium*; before delivery he steals from me. Although the stolen object perishes, he [Julian] says that I will, nonetheless, have the right to deduct from his *peculium* for this, that is, by operation of law the *peculium* was diminished due to his act; the obvious reason is that he became a debtor to me on the basis of the *condictio* [for theft]. Although it is true that if he had stolen from me after his delivery, either I would have no *condictio* at all on this score against the *peculium* or I would have one only to the extent that the *peculium* was enriched by the stolen object, nonetheless in the submitted case not only will I have the right of retention, I can also bring a *condictio* if the *peculium* is now entirely in your hands on the theory that I paid over more than was owed. Accordingly, it should be stated that if the slave had stolen coins from me, and you, not realizing they were stolen, revoked them as part of the *peculium* and spent them, I will have a *condictio* on this score against you, on the theory that you received my object without good reason. 1. If you knowingly sell another's object to me and I am unaware of this, he [Julian] thought that even before an eviction I will succeed in an action on the purchase to the extent of my interest in the thing's becoming mine. Although it is normally the case that the seller is liable only for the buyer's having quiet possession and not for making the object his property, still if a person knowingly sells to an unwitting buyer an object that is another's and not his own, he is liable; for he should be held responsible for there being no bad faith, and this especially if he sells to someone who will manumit or give in pledge.

31 NERATIUS, *Parchments, book 3:* If I should be held responsible for a thing because of a sale and it is taken away from me by force, then although I should guard it, still it is better that there be no further consequence than my having to provide the buyer with the actions for recovering it; for safekeeping is of slight avail against force. I shall have to provide you with these actions to use not only at your judgment but also at your risk, so that all profit and expense fall to you. 1. And [when a slave is not delivered on time] I should be held responsible not only for what I acquired through him but also for what the buyer would have acquired had the slave already been delivered to him. 2. Each of us bought the same object from a nonowner, with no bad faith in the making of the contract of sale, and the object was delivered. Whether we bought from the same person or from different persons, whichever of us first acquired rights over it is to be protected, that is, the one to whom it was first delivered. If one of us had bought from the owner, then he is to be protected in any case.

32 ULPIAN, *Edict, book 11:* If someone bought olive oil from me and in receiving the oil used false weights to deceive me about the measurement or if the seller cheated the buyer with light weights, Pomponius says it can be maintained that [in the first case] the seller [can] sue [on the sale] to force [the buyer's] giving to him the surplus, and this view makes sense; therefore, [in the second case] the buyer will have an action on purchase with which he may gain satisfaction.

33 ULPIAN, *Edict, book 23:* If many objects are bought for a single price, an action on sale and purchase can be brought concerning each of them.

34 ULPIAN, *Edict, book 18:* If in the sale of a farm there is deceit about the condition of the land, an action on purchase will lie.

35 ULPIAN, *Edict, book 70:* If someone bought a farm on the assumption there was no right of way in person or with cattle through that farm and he was then defeated by an interdict on right of way in person or with cattle, he will have an action on purchase. To be sure, a stipulation about eviction is not violated because there was no verdict in an *in rem* action about the right to the servitude; nonetheless, it should be maintained that an action on purchase does lie.

36 PAUL, *Plautius, book 7:* It is the seller of a house who, before its delivery, should obtain the stipulation on threatened damage; he has a duty to exercise safekeeping and care before delivering vacant possession, and obtaining this stipulation is a part of safekeeping and care. Therefore, if he neglected this, he will be liable to the buyer.

37 PAUL, *Plautius, book 14:* Just as it is fair that a third party's deceit not harm a buyer in good faith, so too it is unfair that he be benefited by deceit on the part of the seller.

38 CELSUS, *Digest, book 8:* If the seller of a slave said that the slave had a *peculium* of ten and that no one would revoke it, he should be held responsible for the entire *peculium* even if it is larger, unless they arranged that he be held responsible only up to ten; if it is smaller, he should be held responsible for its being ten and for the slave's being worthy of having that large a *peculium.* 1. If the buyer is responsible for nondelivery of a slave to him, Sextus Aelius and Drusus said that compensation for his board can be recovered through a judgment; their opinion seems to me entirely just. 2. Firmus asked Proculus: If pipes running underground from a lead cistern convey water into a cauldron that is walled in on the sides, are these pipes part of the building, or are they like "things dug, cut, bound, and attached," which are not part of the building? He replied by rescript that it is a question of what the parties arranged. But what if neither buyer nor seller gave any thought to this matter, something that has frequently happened in matters of this sort; do we not more fittingly consider things implanted or inserted in the structure as forming part of it?

39 MODESTINUS, *Replies, book 5:* My question is: If a man sells his farm with the proviso that whatever he possesses within the boundary stones is to be taken as offered for sale and he is aware that he does not possess a particular portion but does not apprise the buyer of this fact, is he liable in an action on purchase? For [I argue that] this general clause should not be relevant to things which the seller knows of in particular and does not exclude, lest otherwise the buyer be defrauded when perhaps he would not have bought had he known this or he would have bought for a smaller price had he been apprised about the particular area. This rule was also reported from republican jurists in the case of a person who made an exception that "if any servitudes are owing, they will be owed"; the jurists responded that if a particular seller had not warned the buyer that he owed particular servitudes to certain individuals, he should be liable on the purchase, since this general exception should be relevant not to things which the seller knew of and which he could or should have excepted expressly, but

rather to things of which he was unaware and so could not apprise the buyer. Herrenius Modestinus responded that if the seller did anything of the sort inquired about for the purpose of cheating the buyer, he can be sued by an action on purchase.

40 POMPONIUS, *Quintus Mucius, book 31:* Quintus Mucius writes: "The owner of a farm sold the trees standing on his property; he accepted money for them, but declined to deliver them. The buyer asked what he ought to do, since he feared that these trees had apparently not become his property." POMPONIUS: The physical substance of trees retained on a farm is not divided from the farm; hence, the buyer cannot as an owner claim individual trees by *vindicatio*, but he does have the action on purchase.

41 PAPINIAN, *Replies, book 3:* In a sale no mention was made of an annual payment for a water channel set up within a house at Rome. If defrauded on this matter, he will have an action on the purchase; and so if he is sued on the sale for the purchase price, this unforeseen burden is taken into account.

42 PAUL, *Questions, book 2:* The seller of two farms formally declares the extent of each of them and on this basis delivers both for a single price; if one should be smaller while the other was larger, for example, if he said that the first was one hundred *jugera* and the second two hundred, if the first is lacking ten, it will not help him that the second is discovered to have two hundred ten. A similar decision on these matters is reported in Labeo. But a doubt can be raised: Will the defense of fraud avail the seller, at least in a case where a small amount of woodland is missing but the farm has more vineyard than was counterpromised? Is it not deceit on his part to press his rights without letup? In the case where the farm is found to be larger in extent than was elsewhere declared, it is the buyer and not the seller who gets the profit; and yet the seller is liable when the measurement is found to be smaller. But does the buyer have any complaint at all if, in the case of a single farm, he discovers that [contrary to specifications] there is more vineyard than meadow, so long as the overall measurement corresponds? A problem similar to that discussed in the case of two farms can occur also if a person sells two *statuliberi* for one price and states that one, who actually should pay fifteen, was ordered to pay ten; for he will be liable on the sale even though the buyer would get twenty from the two of them. But the more correct course is that in all the cases described above the gain should be balanced with the loss, and if the buyer is missing something on account of either the extent or the condition of the land, this should be made up to him.

43 PAUL, *Questions, book 5:* When Titius died, he left Stichus, Pamphilus, and Arecusa to Seia in a *fideicommissum*, and he requested her through the *fideicommissum* to see them all through to freedom after a year. The legatee declined to accept the *fideicommissum*, but she also did not free the heir from her claim. The heir then sold the slaves to Sempronius without mentioning the *fideicommissum* of freedom. After the slaves named above had served the buyer for many years, he freed Arecusa; and the other slaves, having learned of their late master's intentions, also claimed freedom under the *fideicommissum* and summoned the heir before the praetor on whose order they were manumitted by the heir. Further, Arecusa had answered that she did not wish to have the buyer as her patron. When the buyer, through an action on purchase, claimed back from the seller the price for Arecusa as well, the response of Domitius Ulpianus was read to the effect that Arecusa's case fell under the rescript of the imperial constitutions if she did not wish to have the buyer as her patron; but the buyer

could obtain nothing from the seller after his manumission of her. Since I remembered that Julian too was of the following opinion, namely that he thought the action on sale remained even after manumission, my question is which view is correct? In the same hearing, it was also claimed on behalf of the buyer that he get reimbursement for the expenses he had in training one of them. I myself question whose freedwoman Arecusa became when she refused to accept the buyer as a patron; can she have as her patron either the legatee who did not release the heir, or the heir himself? The other two were manumitted by the heir [and so their case presents no problem]. I responded: I have always favored Julian's opinion; he thought that by manumission [the action on purchase is] not [lost, even though an action on the stipulation against eviction] is lost in this manner. Next, as to the buyer's expenses in training the slave, I think the action on purchase suffices also for things of this sort; for it includes not just the price, but the buyer's entire interest in not losing the slave by eviction. Obviously, if you hypothesize that the price is now so greatly exceeded [by the slave's worth] that the seller gave no consideration to such an amount, for example, if you suppose that a slave sold for a small price was evicted after being made a charioteer or a stage dancer, then it seems unfair that the seller be obligated for a great amount,

44 AFRICANUS, *Questions, book 8:* since he may also be a person of limited means; and he ought not to be liable for more than a risk of double.

45 PAUL, *Questions, book 5:* And Africanus reports that Julian too considered this solution, which is the legally proper one; the seller's responsibility is likewise diminished if before the eviction the slave lost value in the buyer's hands. 1. This case seems simpler: You sold me another person's lot, and then, after I built on it, the owner took it away in that condition through an eviction; because I can defeat the owner's claim with the defense of fraud unless he pays the building expenses, the better view is that this matter is not part of the seller's risk. This rule should also be adopted in the case of a slave who is claimed as a slave [by his true owner] and not as a freeman [as in the case above]; the owner ought to be held responsible for the outlays and expenditures. But if the buyer does not possess the building or the slave, he will have an action on the purchase. In all these cases, if someone knowingly sells another's property, he ought to be liable in any event. 2. There remains the third question: Whose freedwoman should Arecusa be if she refuses the buyer? Not without reason it is held that she ought to be made the freedwoman of him by whom she was sold, that is, the heir, since he is also liable in the action on purchase. But this only if Arecusa does not choose the buyer's patronage; for then she remains his freedwoman and he has no action on purchase because he has no interest, since he has her as a freedwoman.

46 PAUL, *Questions, book 24:* If a man sells another person's object and in the meantime becomes the heir of the object's owner, he will be forced to carry out the sale.

47 PAUL, *Replies, book 6:* Lucius Titius received money for the sale of building materials, with a penalty fixed such that if he did not produce them undamaged within the specified time limits, he was liable for the penalty. He died after partially delivering the materials. Since the testator incurred the penalty and his heir did not produce the remaining materials, may he be sued both for the penalty and for interest on it, especially if the buyer borrowed the money and pays very heavy interest on it? Paul replied that on the basis of the contract inquired about, the seller's heir can also be sued for the penalty. Likewise, in an action on purchase, the judge has the discretion, once delay occurs, of taking account of the interest due on the price.

48 SCAEVOLA, *Replies, book 2:* Titius, as heir to Sempronius, sold a farm to Septicius with the proviso: "Whatever rights Sempronius had in the Sempronian farm are yours by purchase for such and such a number of coins." He handed over vacant possession

but did not point out its boundaries. Should he be forced, through an action on purchase, to show what rights the deceased had on the basis of records relating to the inheritance and also to point out the boundaries? I responded that he should be held responsible on the basis of this writing for what the parties are considered to have intended; but if the matter is unclear, the seller must show both the farm's records and its boundaries, as is concordant with a contract of good faith.

49 HERMOGENIAN, *Epitome of Law, book 2:* If a man colluded in setting up a fictitious tenant farmer so as to deceive a buyer, he is liable on purchase; it is no defense if he guaranteed the tenant and the rental payments for five years so that the fraud he devised would be better concealed. 1. Interest on the price cannot be sued for after the principal has been paid, even with delay; for interest is not itself part of the obligation, but is owed at the judge's discretion.

50 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* Due to a statute a buyer no longer owed money for the object of sale, which was not yet delivered to him. Good faith does not allow that the seller be forced to deliver the object and thus lose his property. Had the object been delivered, it would be true that the seller would also lose the object, inasmuch as if he sues for this object, the seller could raise the defense of property having been sold and delivered; nor is it as if the plaintiff had not sold and delivered [the object] to him.

51 LABEO, *Posthumous Works, Epitomized by Javolenus, book 5:* If both buyer and seller were responsible for a delay in presenting and delivering wine, he [Labeo] says it is as if the buyer alone caused its occurrence; for the seller cannot be considered to have caused the buyer a delay if the buyer himself caused a delay. 1. But suppose that you bought a farm under the proviso that you pay the money on the first of July, and on that date the seller was responsible for the money's not being paid to him, but thereafter you are responsible for your not paying; I ruled that the seller can use his contract clause against you; for in the sale the arrangement was that the buyer suffer the clause's penalty whenever he was responsible for his not paying the money. I think this position correct except if the seller committed some fraud in the matter.

52 SCAEVOLA, *Digest, book 7:* A creditor, who had a farm as his security, held on deposit with himself the records of tax tribute previously paid by his debtor; he sold the farm to Maevius with the proviso that the buyer pay any arrears of taxes. This same farm was then sold by the tax-farmer of the district in which it lay, on account of taxes which had in fact already been paid; Maevius bought it [again] and paid its price. By an action on purchase or some other action, may the buyer obtain from the seller delivery to him of the records of the payments mentioned above? He responded that in an action on purchase the buyer can obtain production of the documents in question. 1. An appraised piece of property was given in dowry by a father on behalf of his daughter; it was obligated to a creditor who now seizes it. The father's inheritance is held by his son, the daughter having declined to accept it and being satisfied with her dowry. Is the son liable in an action on purchase for redeeming the property from the creditor and presenting it unencumbered to the husband? He responded that there is liability. 2. The buyer and seller of a civil office agree that the honorarium which is owed by that person [to the officeholder] passes to the buyer. What amount should the

buyer of the position collect and from whom, and what should the seller provide to the buyer in fulfilling this sort of arrangement? He responded that the seller should present the actions *extra ordinem* that he has concerning this matter. 3. In front of his seaside house, a person created a levee by constructing piers; he then sold the house to Gaius Seius "as it had been possessed by him." In the law of sale, does the buyer obtain the levee which his predecessor in title added to the house? He responded that the house will have been sold with the same rights as existed before the sale.

53 LABEO, *Plausible Views, book 1:* If it was specified that the rent of an apartment building would pass to the buyer, the buyer is owed whatever the building was leased out for. PAUL: But if you lease out the entire building and the lessee then leases it out for more and if in selling the building you say that the rent will belong to the buyer, then he receives what the lessee of the entire building owes to you. 1. If you sold a farm on which you had a tomb but you did not reserve the tomb expressly for yourself, your *cautio* on this matter is insufficient. PAUL: On the contrary, provided that a public road runs through to the tomb. 2. If by a sale clause the right of occupancy was reserved for the present occupants, this right of occupancy was properly reserved for all the occupants except the owner. PAUL: But if you provided someone with a free dwelling in a building that you sell, and if your reservation reads, "for the present occupants up to the date each holds under lease," your *cautio* is insufficient since a reservation about these [gratuitous residents] must name them; hence, the buyer may, without penalty, stop them from occupying the building.

54 LABEO, *Plausible Views, book 2:* If you sold a slave and [before delivery] he did something on your order in consequence of which he broke his leg, you do not assume the risk for this act provided that your order was something which he ordinarily did before the sale and provided that you ordered something you would have ordered the slave to do even had he not been sold. PAUL: On the contrary, for if he ordinarily did dangerous work before the sale, this occurrence will be considered as due to your fault; for example, he was a slave who ordinarily walked down a tightrope or was lowered into a sewer. The same rule holds true if you ordinarily order something which a cautious and careful head of a household would not order that slave to do. What if this right is reserved? He can still order the slave to do something unusual which he would not have ordered had he [the slave] not been sold, for example, if you ordered the slave to travel to the buyer who was abroad; this act clearly should not be at your risk. And so this entire matter should be reduced to the seller's bad faith and fault. 1. If it was specified that eighty buried storage jars passed along with a farm and there are more than that number [on the farm], he may give the buyer his choice from all of them, so long as he gives sound ones. If there are only eighty, they go to the buyer as they are; the seller will not owe anything to him for those that are unsound.

55 POMPONIUS, *Letters, book 10:* If a slave who was sold or promised is now in the hands of the enemy, Octavenus thought it the better position that the sale and stipulation were valid since there was *commercium* between buyer and seller; for the problem lies rather in delivering him than in nature. But at the judge's discretion performance should be deferred until performance is possible.

2

LEASE AND HIRE[2]

1 PAUL, *Edict, book 34:* Because the contract of lease and hire is found in nature and among all peoples, it is contracted not by formal words but by agreement, like the contract of sale and purchase.

2 GAIUS, *Common Matters, book 2:* Lease and hire is close to sale and purchase, and it is formed by the same rules of law. Sale and purchase is contracted if the price is agreed upon; similarly, lease and hire is considered to be contracted once the rent is agreed upon. 1. Sale and purchase has so great an apparent kinship with lease and hire that in some cases the question frequently arises whether the contract is sale and purchase or lease and hire. For example, if a goldsmith and I agree that he make for me, from his own gold, rings of a fixed weight and form, and if he receives, for example, three hundred [in payment], is this sale and purchase or lease and hire? The general view is that there is a single transaction which is predominantly sale and purchase. But if I give my gold and a fee is set for his labor, this is undoubtedly lease and hire.

3 POMPONIUS, *Sabinus, book 9:* If a farm is leased out and the tenant farmer receives its equipment "on appraisal," in Proculus's view their arrangement is that the tenant may consider the equipment purchased, just as would occur if dowry property were given on appraisal.

4 POMPONIUS, *Sabinus, book 16:* A contract of "lease or grant on *precarium*," if concluded for as long as the object's lessor or grantor may desire, is dissolved when the lessor dies.

5 ULPIAN, *Edict, book 28:* If I lease out a dwelling to you and shortly thereafter remit your rent, the proper action is still on lease and hire.

6 GAIUS, *Provincial Edict, book 10:* The lessee of an object is not compelled to return what he obtains for the object in an action for theft.

7 PAUL, *Edict, book 32:* I lease another person's apartment house to you for fifty; you then lease it to Titius for sixty. The owner does not allow Titius to dwell in it. If you sue [me] on the hire, the general view is that you should receive sixty since you are liable to Titius for sixty.

8 TRYPHONINUS, *Disputations, book 9:* But it is worth considering whether neither fifty nor sixty is owed, but rather the amount of the interest in exploiting the leasehold; and the middleman should obtain as much as he must provide to the one who hired from him, since the profit from the contract, which was concluded for the purpose of a higher rent, raises the amount adjudged. But, nonetheless, the first lessor will have a counterclaim for the fifty which he would have received from him [his lessee] had the owner of the apartment house not forbidden the sublessee to live in it. That is current law.

9 ULPIAN, *Edict, book 32:* If a man leases to me a house or a farm that he purchased in good faith and he is then evicted through no bad faith or fault on his part, Pomponius says that he is nonetheless liable to the lessee on hire for presenting to him the enjoyment of what he hired. Obviously, if the owner does not allow [him to remain] and the lessor stands ready to offer another and no less comfortable dwelling, he says the fairest position is that the lessor is released [from further obligation]. 1. Here can be appended what Marcellus wrote in the sixth book of his *Digest*: "If a fructuary leases out a farm for five years and then dies [before the term is over], his heir is not liable for providing the [tenant's] enjoyment, no more than the lessor is liable to the lessee when an apartment house burns down." But Marcellus asks if the lessee is liable on lease

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2. *Note on terminology.* The terminology for the bilateral contract of lease (*locatio*) and hire (*conductio*) is confusing and hard to translate. There are three fundamental types of lease and hire with many subtypes: (1) Lease of an object (*res*) is concluded between a lessor (*locator*) and a lessee (*conductor*); (2) when the doing of a job (*opus faciendum*) is let out by a *locator*, the person undertaking the job is named the contractor (*conductor* or less frequently *redemptor*); and (3) when a person lets out his own labor to a hirer, he is the *locator* and his employer is the *conductor*. In each of these three cases, the monetary rent or fee or wages (*merces*, less often *pretium*) passes from one party to the other according to the economic sense of the contract.

for providing a rental payment prorated to his [actual] time of enjoyment, just as he would owe had he hired the services of a slave held in usufruct or a dwelling. He prefers to allow liability, and this is the fairest position. He then asks whether he may recover outlay he made on the farm under the assumption he would enjoy it for five years. He says that he may not recover this, since he should have foreseen the possible outcome. However, what if he [the fructuary] leased it to him while posing not as a fructuary but as the farm's owner? Obviously, he is liable, since he deceived the lessee; and so the Emperor Antoninus together with the deified Severus replied in a rescript. Likewise, in the case of a building destroyed by fire they replied that rent was due for the time when the building stood. 2. Julian, in the fifteenth book of his *Digest*, says that the agreement should be upheld if a man leases out his farm with the proviso that the tenant be held responsible for whatever occurred due to a higher force. 3. If a lease clause gave notice to a property's tenant farmers that they should keep a harmless fire, the lessee will not be held responsible for the risk if, for example, a fortuitous mishap should provide the cause of a conflagration. But if the loss is caused by the lessee's fault for which he is necessarily held responsible, then he will be liable. 4. The Emperor Antoninus and his father replied in a rescript: When a herd which a man had hired was driven off, that "if it can be proved that robbers drove off the goats without fraud on your part, you will not be forced in an action on lease to take responsibility for the mishap, and you will recover, as unowed, any rent paid for the ensuing period." 5. Celsus, in the eighth book of his *Digest*, wrote that inexperience should also be counted as fault; if someone contracts to pasture calves or to repair or adorn something, he should be held responsible for fault, and it is fault when he errs due to inexperience, since, as Celsus says, it was obviously as a craftsman that he took the job. 6. If you lease out another person's house to me, and it is then legated or given to me, [a jurist held that] I am not liable to you on the lease for payment of rent; but should any rent be owed for the previous time before the date of the legacy? I think it should be paid.

10 JULIAN, *Ferox: book [?]:* And I may properly sue on the hire also to force your releasing me [from further obligation].

11 ULPIAN, *Edict, book 32:* Should a lessee be held responsible for fault on the part of his slaves and of those whom he admits? And to what extent responsible: to surrender his slaves noxally or rather to be liable in his own right? And will he just present the actions against those he admits, or will he be liable as if the fault were his own? My view is that he is held responsible in his own right for the fault of those he admitted even if the parties did not agree to this, provided that he is guilty of fault in admitting them because he has such people as members of his household or as guests. Pomponius supports this view in the sixty-third book of his *Edict*. 1. If the parties agreed in the lease "that he not have a fire" and he had one, he will be liable even if a fortuitous mishap allowed the conflagration to occur, because he should not have had a fire. "To have a harmless fire" is different; for it allows having a fire provided it is harmless. 2. Likewise, the lessee should take care in no way to lower in value the thing's legal or physical condition, nor to allow it to become lower. 3. A man contracted to transport wine from Campania; when someone stirred up a legal dispute [over the wine's ownership], he sealed the wine under his own and the other person's signets, and deposited it in a warehouse. He is liable on the lease [of a job] for restoring possession of the wine to the lessor without dispute, unless he is free of fault. 4. Lessee and lessor agreed that hay not be stacked in a city villa. He [the lessee] stacked hay, and his slave then set a fire and ignited it. Labeo says that the lessee is liable on the lease because he himself furnished the cause by bringing in [hay] against the contract of hire.

12 HERMOGENIAN, *Epitome of Law, book 2:* But if some outsider sets the fire, an assessment of the loss will also be made in an action on lease.

13 ULPIAN, *Edict, book 32:* The driver of a cabriolet, that is, a coachman, while attempting to pass others, overturned his cabriolet and dashed down or killed a slave. I think there is an action on lease [of a job] against him; for he should have refrained; but a *utilis* form of the Aquilian will also be granted. 1. If a shipowner contracts to convey freight to Minturnae and then transfers the goods onto another ship because his own ship cannot get up Minturnae's river and the second ship then founders at the river's mouth, is the first shipowner liable? Labeo says he is not liable if he is free from fault; but if he acted against the owner's will or at an improper time or [if the transfer was] to a less suitable ship, then there should be an action on lease [of a job]. 2. If a ship's captain sent his ship into a river without a pilot, and when a storm arose he could not steer the ship and so lost it, the passengers will have an action on lease [of a job] against him. 3. If someone contracts to train a slave and then takes him abroad where he [the slave] either is captured by the enemy or is killed, the prevailing view is that there is an action on lease [of a job], provided that he had not contracted to take him abroad as well. 4. Julian wrote further in the eighty-sixth book of his *Digest* that if an apprentice is doing poor work and a cobbler strikes his neck with a shoe last so forcefully that his eye is knocked out, his father has an action on lease [of a job]; for although teachers are allowed to punish mildly, this one did not observe the limits. I spoke above about the Aquilian action. Julian denies that the action for insult lies, because he did this not to insult but to instruct. 5. If a jewel was delivered for setting or engraving and it was then broken, there will be no action on lease [of a job] if this happened due to a flaw in the stone, but there will be one if it was due to the worker's inexperience. To this opinion should be added: unless the craftsman took this risk as well upon himself; in that event, there will be an action on lease [of a job] even if it occurs due to a flaw in the stone. 6. If a fuller takes in clothes for cleaning and mice then gnaw at them, he is liable on the lease [of a job] because he should have guarded against this. If the fuller mixed up a cloak and gave one person's to someone else, he is also liable on the lease [of a job] even if he acts unknowingly. 7. At the approach of an army a lessee moved out; the soldiers then removed windows and other things from their billet. If he gave no formal notice to the owner when he moved out, he will be liable on the lease. But Labeo says he is liable if he could resist and does not, and his opinion is correct; and likewise, if he could not give formal notice, I do not think him liable. 8. A man hires measures; a magistrate then orders them to be broken. If they were not just, Sabinus distinguished as to whether or not the lessee knew this; there is an action on lease if he did, but not if he did not. If, however, they are [in fact] just, he is still liable if the aedile did this due to the lessee's fault. So Labeo and Mela write as well. 9. On a lease, there can be two debtors for the entirety. 10. A contract clause for the lease of a job had stated that should the work not be completed on time, the lease could be given to a substitute. The earlier contractor will be liable on the lease [of a job] only if the substitute lease was due to this clause; a substitute lease cannot be made before the day for completion had passed. 11. When a man remains in the leasehold after the term of hire is over, not only will he be construed as having rehired, his pledges are considered to remain obligated. This is true except if a third party obligated property on his behalf during the earlier lease; his agreement will be required afresh. As for my statement that a tenant farmer is considered to have rehired because of each party's silence, this should be taken as meaning that they are construed to have renewed the same lease during that year in which they keep silent, and not for subsequent years even if, for example, a five-year period had originally been provided for the hire. But again, if they arrange nothing to the contrary in

the second year after the five-year period is over, the same lease is construed as having remained in that year also; for they are considered to agree by the very fact of their remaining silent. And this holds true for each single year. But for urban property there is a different rule; each [tenant] is obligated only for as long as he occupies the dwelling, unless a fixed term of hire was established in writing.

14 ULPIAN, *Edict, book 71:* A man who leases for a fixed term is a tenant farmer also after the term's end; the owner is considered to lease anew when he allows the tenant to remain on the farm. Contracts of this kind require neither formal words nor writing; they take force by mere agreement; and so if the owner, in the meantime, went mad or died, Marcellus says that it is impossible for the lease to be renewed, a view that is correct.

15 ULPIAN, *Edict, book 32:* The lessee is given the action on hire. 1. It lies for reasons such as these: as, for example, if he is not permitted to enjoy the thing leased, because possession of all or part of the land is not provided or the villa is not repaired or the stable or a place needed for sheltering his herds; or if they agree on something in a clause of the hire and this duty is not carried out, there will be an action on hire. 2. If the force of a catastrophic storm befalls him, should the lessor be held responsible to the lessee for anything? Servius says that the owner should be held responsible to his tenant farmer for all force against which resistance is impossible, as, for example, that of rivers, jackdaws, and starlings, and if some similar event occurs or if there is an enemy invasion; but if flaws arise from the object itself, this loss is the tenant's, for instance, if wine sours or if crops were destroyed by worms or weeds. But again, if there were a landslide that removed the entire crop, the loss is not the tenant's, since he should not have to provide land rent over and above the loss of his perished seed. But again, if a frost destroys an olive crop or if this occurs due to an unaccustomed heat wave, the loss will be the owner's; but if nothing out of the ordinary occurs, the loss is the tenant's. The same is true if a passing army wantonly steals something. But again, if an earthquake so completely destroys the land that it no longer exists, the owner bears the loss; for he must present the land to the lessee for his enjoyment. 3. When a man alleged that his farm had burned down and sought a remission, he received this rescript: "If you cultivated the property, you are not undeserving of relief for the mishap of an unforeseen conflagration." 4. Papinian, in the fourth book of his *Replies*, says that if in one year a man gives his tenant a remission due to barenness and plenty then ensues in the following years, the remission is no obstruction to the owner; the entire rental payment for the year of the remission may be collected. He responded that this is also true for loss on public land held under long lease. But again, if due to one year's barrenness the owner remits using the form of a gift, the same rule holds on the theory that this is not a gift, but a settlement. But what if the barren year for which he gave remission to him was the final year [of the lease]? The better position will be that if the earlier years were plentiful and the lessor knew this, he [the lessee] should not be called upon to undergo an offset. 5. When someone complains about the small yield of his crops, a rescript of the deified Antoninus holds that no consideration need be taken of this [claim]. Likewise, another rescript holds: "You ask for something unheard of, namely to receive a remission due to the age of your vines." 6. Likewise, when due to the loss of a ship the passage money is reclaimed which he [the carrier] accepted in advance, Antoninus Augustus replied by rescript that it is not unreasonable for the emperor's procurator to reclaim passage money from him because he did not fulfill the duty to convey; this rule should

hold for all persons alike. 7. Whenever the amount of a remission is calculated because of the causes described above, the lessee is not claiming his interest, but rather a prorated abatement of rent; for the rest, it is established that the loss of seed is borne by the tenant farmer. 8. Obviously, if the owner does not allow enjoyment, then whether he himself made the lease or someone else did so for another person's property by posing either as a procurator or as the owner, it is the interest [of the lessee] that is due [from the lessor]. This is Proculus's response in the case of a procurator. 9. Sometimes a man will have an action on hire to gain discharge from a lease, as Julian wrote in the fifteenth book of his *Digest*. For instance, I leased a farm to Titius and he then died leaving a *pupillus* as his heir; the tutor arranged that the *pupillus* refuse the inheritance, and I then leased the farm for more money. Later the *pupillus* won a *restitutio* to his father's property. [Julian held that] he will obtain nothing in an action on hire except that he be discharged from the lease; for I had a legally acceptable reason for leasing,

16 JULIAN, *Digest, book 15:* since at that time no actions were accorded against the *pupillus*.

17 ULPIAN, *Edict, book 32:* He may bring an action on tutelage against the tutor, so he [Julian] says, if he ought not to have refused it.

18 JULIAN, *Digest, book 15:* And in this action is included the profit he could have made from hire of the farm.

19 ULPIAN, *Edict, book 32:* But you may add to Julian's view that if I conspired with the tutor then I am liable on hire for the pupil's interest. 1. If someone unknowingly leases out defective storage jars and wine runs out of them, he will be liable for the [lessee's] interest, nor will his lack of awareness have been excused, so Cassius wrote as well. It is quite different if you leased out a pasture in which harmful weeds grew; in this case, if cattle either died or lost value, the [lessee's] interest is owing if you knew this, but if you were unaware of it, you may not sue for payment of rent, a view that Servius, Labeo, and Sabinus also approve. 2. Now we must examine what the lessor of a farm customarily provides to his tenant farmer under the heading equipment; for if he does not provide this, he is liable on the hire. There is a letter from Neratius to Aristo to the effect that the tenant must, in any case, be provided with storage jars and a press and grinder both fitted with ropes, and if not, the owner must provide them; but the owner must also repair a broken press. If any of these things are broken due to the tenant's fault, he is liable on the lease. Neratius wrote that the tenant ought to make for himself the frails used for pressing olives; but if the olives are pressed by slats, the owner must provide the press beam and the winch and the slats and the press lid and the screws used to raise the beam. Likewise, the owner must provide the cauldrons in which the olives are washed with hot water and by analogy the storage jars for wine, which the tenant must pitch for his immediate use. All these things should thus be undertaken except if the parties expressly arranged something else. 3. If in a lease the owner reserves that he will take a fixed amount of grain at a fixed price and the owner then refused both to take the grain and to deduct the money from the rent, he can sue on the lease for the entire amount; but in that event it is logical to think it consistent with the judge's discretion that he assess the extent of the lessee's interest in paying the reserved portion of his rent in grain rather than in money. 4. If an urban tenant installs a door or something else in a structure, what action should lie? The more correct position is what Labeo wrote, namely that an action lies on the hire to permit him to remove it, but with the condition that he give a

cautio against threatened damage: that he will in no way lessen the building's value during the removal, but will restore the building to its original appearance. 5. If an urban tenant moves a bronze strongbox into his building and the owner then narrows the entrance to the building, the more correct position is that whether he did this knowingly or not, he is liable both on the hire and by the action for production; it is within the judge's discretion to force him to widen the entrance and provide the tenant with an opportunity to remove his strongbox, of course, at the lessor's expense. 6. If a man who hired a dwelling for a year pays the rent for the whole year [in advance] and after six months the building collapses or is destroyed by fire, Mela wrote quite rightly that he may reclaim the payment for the remaining time by an action on hire, but not through a *condictio* on the theory that the money was not owed; for he did not overpay by mistake, but in order to gain advantage in making the hire. It is quite different if a man would have hired for ten and paid fifteen; in this case, if he paid by mistake because he thinks he hired for fifteen, he will not have an action on hire but only a *condictio*. For there is considerable difference between a person paying by mistake and one who prepays his entire rental payment. 7. If a man undertook the conveyance of a woman by ship and a child was then born on board, the preferable view is that nothing is owed for the child, whose passage money is not large and who does not use all the things prepared for the use of passengers. 8. It is obvious that an action on hire passes also to the [lessee's] heir. 9. When a scribe leased out his own labor and his employer then died, the Emperor Antoninus together with the deified Severus replied by rescript to the scribe's petition in these words: "Since you allege that you are not responsible for your not providing the labor you leased to Antonius Aquila, it is fair that the promise [of wages] in the contract be fulfilled if during the year in question you received no wages from anyone else." 10. Papinian as well, in the fourth book of his *Replies*, wrote that when an imperial legate died, staff members were owed their salary for the remainder of the term only if they did not serve as staff members with others later in this term.

20 PAUL, *Edict, book 34:* Like purchase, lease also can be contracted under a condition. 1. However, it cannot be contracted in order to make a gift. 2. Sometimes the lessor is not obligated although the lessee is, for example, when a buyer hires a farm until the price is paid to him [the seller].

21 JAVOLENUS, *Letters, book 11:* In the sale of my farm, it is agreed that until the price is completely paid, the buyer should have the farm under hire at a fixed rent; when the price is paid, should he be released from the rent? He responded: It is required by good faith that agreements be executed; but he owes no more [rent] to the seller except for that portion of the term when the money [the price] was unpaid.

22 PAUL, *Edict, book 34:* Likewise, if the sale of the object were voided due to nonpayment of its price, an action on lease will lie. 1. There is a lease [of a job] whenever the doing of a job is given out. 2. When I lease out the construction of an apartment building with the proviso that the contractor undertake everything at his own expense, he transfers ownership of these things to me, but it is still a lease; for the craftsman leases out his own labor, that is, the duty to construct. 3. The nature of sale and purchase allowed buying for less what is worth more and selling for more what is worth less, the reciprocal taking of advantage; this is also the rule in leases and hires.

23 HERMOGENIAN, *Epitome of Law, book 2:* And thus when a lease is made it cannot be rescinded on the basis of the rent being too low unless the adversary can be proven guilty of fraud.

24 PAUL, *Edict, book 34:* If it is provided in a lease clause [of a job] that the owner is to

judge the work acceptable, this is construed to mean that what they had called for was the judgment of an upright man, and the same rule holds had they provided for judgment by some third party. Good faith requires that a judgment be offered such as is compatible with an upright man. This judgment will pertain to the quality of the work, but not to extending a time limit fixed by a lease clause, unless this too was provided for by the clause. It follows from this that approval induced by the contractor's fraud is void, and that an action on lease [of a job] will lie. 1. If a tenant farmer leases out his farm, the property of the subtenant is not obligated to the owner; but the crops continue as pledges, just as they would, had the first tenant harvested them. 2. If a house or a farm is leased with rental payments spread over a five-year period, the owner can bring an action at once if the urban tenant abandons his dwelling or the farm tenant the cultivation of his farm. 3. But he can, likewise, bring an action concerning things which they should have done at present, for instance, that they complete some job or do the planting. 4. A tenant farmer, if he is not permitted to enjoy, may rightly sue forthwith for the entire five-year period even if the farm's owner should permit enjoyment during the remaining years; the owner is not discharged from his obligation because he will permit enjoyment of the farm in the second or third year. Expelled from his leasehold, he moves to another tenancy and may not fulfill two tenancies at once; he is not obligated as to rental payments, and he may obtain as much profit as he would have made during each year. Permission to enjoy comes too late if it is offered at a time when he cannot enjoy due to his involvement in other things. But if he forbade him for a few days but then gives permission while the tenant's condition is entirely unchanged, his delay of a few days will not affect the obligation at all. A tenant also successfully sues on the hire if what they agreed to is not provided in accordance with the lease or if he is forbidden enjoyment by the owner or a third party whom the owner can stop. 5. A man leased out a farm for many years, and then in his will he condemned the heir to discharge the lessee [from paying rent]. If the heir does not allow him enjoyment for the remainder of the term, an action on hire lies; but if he should allow this without remitting the rent, he is liable on the will.

25 GAIUS, *Provincial Edict, book 10:* If the amount of rent is promised at the discretion of an unspecified third party, no contract of lease and hire is construed as arising; but if for "as much as Titius estimates it to be," the lease is valid subject to the condition that if, in fact, the person named fixes the rent, then rent must be paid and the lease must come into effect in full accord with his estimate; but if he cannot or will not fix the rent, then the hire is void on the theory that no rent was fixed. 1. When a man leases out to someone the enjoyment of a farm or a dwelling, if he then for some reason sells the farm or building he should provide that with the buyer as well, through the same agreement, the tenant farmer is permitted to enjoy and the urban tenant to dwell; otherwise he, if forbidden [to enjoy or dwell], may sue him on the hire. 2. If a neighbor builds and the windows of an apartment are darkened, [a jurist held that] the lessor is liable to the urban tenant; there is clearly no doubt that the tenant farmer or urban tenant may leave the leasehold, and similarly, if he is sued for the rent, account should be taken of his counterclaim. I would construe the same result if the lessor does not restore doors or windows that are too broken down. 3. The lessee should perform everything in accord with the clauses of the lease. Above all, the tenant farmer should see to it that he does farm work during his term as well, so that he did not make the farm worth less by his unseasonable cultivation. Further, he should take care of the farmhouses so as to preserve them in good condition. 4. It is also counted as his fault if a neighbor cuts down trees due to a quarrel with him. 5. Also, if he himself cuts them down, he is liable not only on the lease, but also by the Aquilian law, as well as by the *Law of the Twelve Tables* on secretly felling trees, and by the interdict against force or stealth. But in any case, it is part of the judge's discretion in a trial on lease that the lessor give up his other actions. 6. Higher force, which the Greeks

term "the force of god," should not be a source of loss to the lessee if his crops are damaged more than is bearable; on the other hand, if the tenant farmer does not lose his considerable profit, he should bear with equanimity a slight loss. Clearly, I am speaking about a tenant farmer who hires for a fixed sum of money; on the other hand, a métayer bears both profit and loss in common with the farm's owner, much like the law in partnership. 7. A man undertook [as a job] to transport a column. If it broke while being raised or carried or repositioned, he is held responsible for the risk if this happens due to his own fault or that of those whose labor he employs; but there is no fault if all precautions were taken which a very careful person would have observed. I would obviously construe the same result if someone undertakes [as a job] to transport storage jars or wood; and the same rule can be applied also to other things. 8. If a fuller or a clothes-mender loses clothing and then gives satisfaction to the [clothing's] owner on this score, the owner must cede the *vindicatio* and the *condictio* for it.

26 ULPIAN, *Disputations, book 2:* When a man leases out his labor to two people simultaneously, their arrangement is that satisfaction be given to the earlier hirer first.

27 ALFENUS, *Digest, book 2:* The occupants, if their use of some portion of an apartment is a bit less comfortable, must not immediately make a deduction from the rent; for [Servius said that] the occupant is subject to the condition that he bear a small part of the discomfort if something unforeseen occurred on account of which the owner had to raze something; but not to the extent that the owner had laid bare a portion of the apartment in which the occupant's main use lay. 1. He was also asked whether or not someone owes rent if he moved out due to fear. He responded that if there were grounds for his fearing danger, then although there was in fact no danger, he nevertheless owes no rent; but if there was no legally acceptable ground for fear, he still owes it.

28 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* If the lessee's use of a dwelling in a home is unchanged, 1. he [Labeo] thinks that rent is owed even for that part of the home which became defective. 2. [Labeo thinks that] the rule is the same if he had the opportunity to take on hire, namely that he pay the price of the hire. But if the lessor had not provided the lessee with the opportunity to take the house on hire, and he hired [another] one to live in, he [Labeo] thinks that he must be provided with as much as he [the lessor] would have provided in the absence of bad faith. Still, if he had obtained a dwelling for free, reduction from the lease of the house should be made proportionate to this period.

29 ALFENUS, *Digest, book 7:* A lease clause stated: "The lessee of public land shall not fell nor bark nor burn the woodland, nor allow anyone to back or fell or burn." Should the lessee stop someone if he saw him doing one of these things, or should he in addition guard the woodland to prevent anyone's being able to do it? I responded that the word "allow" has both meanings, but that on the whole the lessor seems to have desired not only that the lessee stop someone if he chanced to see him felling the woodland but also that he take care and make an active effort to prevent someone's felling it.

30 ALFENUS, *Digest, Epitomized by Paul, book 3:* A man had hired an apartment building for thirty and then leased out the apartments so as to collect forty from all of them; the building's owner had demolished it because he says the structure was defective. If the lessee of the entire building sues on hire, what value should be given to his claim? He [Servius] responded that if he had to demolish a damaged structure, assessment should be made proportionate to the amount for which the property's owner leased it, because the occupants could not dwell in it during this period; but if demolition was not required and he did this merely because he wished to build better, then he must be condemned to pay the amount of the lessee's interest in the occupants not moving out. 1. The aedile in a municipality had hired baths so that the citizens might bathe there for free; three months later a fire occurred. He [Servius] responded that the bath-keeper [the lessor] can be sued on the hire for a payment of money proportionate to the time in which he did not provide bathing. 2. A man leased out his mules for [carrying] a fixed maximum of burden. When the lessee injured them [by loading them] with a greater weight, he inquired about an action. He [Servius] responded that he has a suit available either through the Aquilian law or on the lease; the Aquilian action can lie only against the one driving the mules at that time, but even if a third party injured them an action on lease against the lessee is available. 3. A man had leased out the building of a house on the following terms: "To the extent that stone is needed for this job, the owner will pay to the contractor seven per foot for his stone and remuneration." Should the job be measured [only] when it is finished or while still incomplete? He [Servius] responded: while still incomplete. 4. A tenant farmer had received a farmhouse subject to the proviso that he return it undamaged except for force and wear; the tenant's slave set fire to the farmhouse, no fortuitous mishap intervening. He [Servius] responded that this type of force is construed as not being excepted, nor did they make an arrangement that he was not held responsible if some household member set fire to it; both parties wished to except external force.

31 ALFENUS, *Digest, Epitomized by Paul, book 5:* Several people had poured their grain together into Saufeius's ship; Saufeius had returned his grain to one of them, and his ship had then foundered. Can the others sue the shipowner for their share of the grain through an action for the pilfering of cargo? He [Servius] responded that objects are leased in two ways: either that the same object be returned, as when clothes are entrusted to the care of a fuller, or that an object of the same kind be returned, as when beaten silver is given to a craftsman to make vessels or gold to make rings. In the former case, the thing remains its owner's; in the latter, a loan is made. The rule is the same for a deposit: If someone deposited a specific amount of money in such a way that he does not hand it over enclosed in a box or under seal, but counts it out, the depositee owes nothing except to pay an equivalent amount. Accordingly, the wheat is construed as becoming Saufeius's and as being validly handed over. But if each person's wheat had been separately enclosed within partitions or baskets or in a different vat, so that each person's could be distinguished, we cannot make an interchange and the person to whom the wheat belonged can bring a *vindicatio* to recover what the shipowner paid. And so [Servius said that] he rejected the actions for pilfering of cargo, since if, on the one hand, the goods were of the same type and were handed over to the shipowner in order that they become his immediately, and the merchant [in

this way] made a loan, then the cargo is evidently not being pilfered since it belonged to the shipowner; but if, on the other hand, the same thing that was handed over is to be returned, the lessor [of the shipowner's services] has an action for theft, and so the action for pilfering of cargo is superfluous. But if the grain had been handed over such that it could be repaid in kind, the contractor [the shipowner] is liable to the extent of his fault, since one is liable for fault in a matter contracted for both parties' benefit; but it is scarcely fault that he returned some grain to only one person, since he had to return it to somebody first, even though he thereby advantaged this person more than the others.

32 JULIAN, *From Minicius, book 4:* A man leased out the cultivation of a farm for several years, then died and legated the farm. Cassius denied that the tenant farmer can be compelled to cultivate the farm since the heir has no interest in it. But if the tenant wished to cultivate and was prevented by the legatee of the farm, the tenant has an action against the heir, and this loss falls on the heir; similarly, if someone would have sold an object and then legated it to a third party before delivery, his heir would have been obligated both to the buyer and to the legatee.

33 AFRICANUS, *Questions, book 8:* If you leased out a farm to me and it was then made public property, [Julian held that] you are liable to me in an action on hire for allowing me the enjoyment even though you are not responsible for your failing to provide it; likewise, so he says, you will still be liable if you had undertaken to construct a building and the earth sank. Similarly, if you sell a farm to me and it is made public property before delivery of vacant possession, you would be liable on purchase; but this is correct only to the extent that you refund the price, not that you be held responsible for my additional interest in having vacant possession delivered to me. I think that this rule should be enforced also in the case of hire, namely that you return the rent I paid, that is, for that period when I did not enjoy, and in an action on hire, you will not be forced to take further responsibility. For if your tenant farmer is forbidden to enjoy the farm by you or by a person whom you can stop from doing this, you will be held responsible to him for the amount of his interest in enjoyment, his profit being part of this interest; but if he will be hindered by a person whom you cannot stop due to his greater force or power, you will owe him no more than the return or remission of the rent,

34 GAIUS, *Provincial Edict, book 10:* just as if this occurs due to a raid by pirates.

35 AFRICANUS, *Questions, book 8:* The distinction here corresponds to one introduced by Servius and generally approved, namely that if an owner rents out an apartment house as an entirety and then through his rebuilding he makes the lessee's enjoyment impossible, the point to be examined is whether or not the demolition of the structure was required. There is no difference between the lessor of a building being forced to repair it due to its age and the lessor of a farm being forced to put up with insult from a person he could not stop. It should be understood that I make this distinction concerning a person who both leases out the enjoyment of his own property and contracts the arrangement in good faith, but not concerning a person who fraudulently leases out another's property and cannot resist the owner's forbidding a farm tenant to enjoy. 1. We were co-owners of a farm, and we agreed to hold it under hire in alternate years for a fixed price; when your year was about to end, you deliberately destroyed the crops for the next year. I may sue you through two actions, one on lease and one on hire; in the action on lease, my own share will be given judicial consideration; in the action on hire, your share. He [Julian] then remarks: "In an action for dividing common property, will you not be held responsible to me for the loss as far as my share is concerned?" His remark is apt, but I think the opinion of Servius is also correct, namely that when I preserve my property by one of these actions, the other action with him is obviously extinguished. We ask the same question in simpler form if the

hypothetical involves two men, both owning their own farms, who agree that each take the farm of the other on hire with the crops to be counted as rent.

36 FLORENTINUS, *Institutes, book 7:* When the performance of a job is leased out as an entirety, the contractor's risk continues until the job is approved. But if it is undertaken such that it is performed in feet or units of measure, the contractor's risk lasts only for as long as measurement is not made; and in either case it will count against the [job's] lessor if he is responsible for the services not being approved or measured. But if the job is destroyed by a higher force before it is approved, the risk is the lessor's unless something different was arranged; nor should the lessor be provided with more than what he would have obtained through his own care and work.

37 JAVOLENUS, *From Cassius, book 8:* If a job is destroyed by some force before being approved by the lessor, the loss falls on the [job's] lessor if the job was such that it should be approved.

38 PAUL, *Rules, sole book:* A man who leases out his labor should receive wages for the entire term if he is not responsible for his labor not being rendered. 1. Likewise, advocates should not return their fees if they are not themselves responsible for their not pleading a case.

39 ULPIAN, *Edict, book 2:* Lease usually does not bring about a change in ownership.

40 GAIUS, *Provincial Edict, book 5:* A man who receives a fee for the safekeeping of something is held responsible for the risk of its safekeeping.

41 ULPIAN, *Edict, book 5:* But Julian says that there can be no action against him over damage done by a third party; for by what kind of safekeeping could he make certain that wrongful damage cannot be done by a third party? But Marcellus says that this can sometimes occur, if he could have guarded against the damage being done or if the guard himself does the damage; Marcellus's view deserves approval.

42 PAUL, *Edict, book 13:* If you steal a slave leased to you, both actions can be brought against you, namely the action on lease and that for theft.

43 PAUL, *Edict, book 21:* If you wound a slave on lease to you, an Aquilian action, as well as one on lease, lies for this wound; but the plaintiff should settle for one or the other, and this is part of the discretion of the judge before whom the action on lease is brought.

44 ULPIAN, *Edict, book 7:* No one can lease out a servitude.

45 PAUL, *Edict, book 22:* If I lease out a house to you and my slaves then cause you loss or steal from you, I am liable to you not on the hire, but by a noxal action. 1. I lease out a man for you to have in your shop, and he then steals from you. A question can be raised about whether the action on hire is enough, the theory being that it is not in accord with good faith for us to have arranged that you suffer any loss because of the thing you leased; or should it further be held that a charge of theft lies outside the sphere of the lease and this delict involves its own distinct action? The second view is better.

46 ULPIAN, *Edict, book 69:* If a man hires in exchange for [rent of] a single coin, there is no lease because this comes to resemble a gift.

47 MARCELLUS, *Digest, book 6:* Whenever it may appear that a man sold or leased [a thing] to many buyers or lessees and then looked to each one individually for the entire debt, individuals should be forced to present a share provided that it is agreed that all are solvent; however, it would perhaps be more just that if all are solvent, the plaintiff not lose his right of suing whomever he wishes [for the entirety], provided he not refuse to provide [to defendants] his actions against the others.

48 MARCELLUS, *Digest, book 8:* If I lease out to someone a job which I undertook to do

myself, the accepted view is that I have an action [against the subcontractor] on lease [of a job]. 1. If a man held on lease a slave or some other movable thing and did not return it, he will be condemned to pay what the plaintiff evaluates, under oath, the object to be worth.

49 MODESTINUS, *Exemptions, book 6:* Those who have been made tutors or curators are forbidden to become lessees of the emperor before giving an account of their guardianship; if someone conceals this and succeeds in leasing imperial lands, he is punished for his deception, as the Emperor Severus ordered. 1. Accordingly, those exercising the office of curator or tutor are forbidden to lease lands from the imperial treasury as well.

50 MODESTINUS, *Encyclopaedia, book 10:* If someone unknowingly leases to a soldier in the belief he is a civilian, the view to be approved is that he can collect rent; for a person who fails to recognize a soldier intends no disrespect for military service.

51 JAVOLENUS, *Letters, book 11:* I leased out a farm with the contract proviso that if it was not cultivated according to the contract, I could lease it out again, and I would then be owed the difference if I leased it for a smaller amount; we made no agreement that if I leased it for more, I would owe this to you. When no one cultivated the farm, I leased it out for more. Do I owe this sum? He responded: In obligations of this type, we should consider above all what both parties agreed to; but in this case, it appears they tacitly agreed that nothing would be owed if the farm were to be leased for more money, that is, that their agreement should be interpreted as benefiting only the lessor. 1. I leased out a job under the condition that I pay the contractor a fixed fee daily; he did a defective job. May I sue on the lease [of a job]? He responded: You leased the job with the proviso that the contractor demonstrate its quality to you; even if it was agreed that a fixed sum be given for single days of work, nonetheless the contractor should be held responsible to you for defects in his job. It makes no difference whether a job is leased out for one lump price or by single days of work, provided that the contractor was responsible for the entire bill of accounts. So he will be able to sue on the lease [of a job] a man who did a defective job, but not if the fee was arranged by single days of work with the provision that the job be done at the owner's discretion, since then the contractor is obviously not at all responsible to the owner for the [overall] quality of the job.

52 POMPONIUS, *Quintus Mucius, book 31:* If I lease a farm to you for ten and you think you hired it for five, our arrangement is void; but again, if I feel that I lease it for a smaller sum, and you that you hire for a larger, the lease will in no case be for more than what I thought it to be.

53 PAPINIAN, *Replies, book 11:* When a state contractor leased out public lands to a tenant farmer and a third party gave verbal guarantee to the contractor on behalf of the tenant, that person is not liable to the state. However, the crops remain under pledge.

54 PAUL, *Replies, book 5:* Is the verbal guarantor of a lease liable also for interest on unpaid rent? Does not he benefit from the *constitutiones* providing that those who pay money for others must assume liability only for the loss of the principal? Paul responded: If, indeed, the verbal guarantor obligated himself for the entire lease relationship, then he too, just like the tenant farmer, should be held responsible for interest on rent which is paid too late due to the tenant's delay; for although in actions of good faith interest does not so much stem from the obligation as it is added on at the judge's discretion, nonetheless when a verbal guarantor attached himself to the entire relationship, it seems fair that he also assume the burden of interest. Likewise, if his verbal guarantee is in this form: "Do you bid me trust your faith for whatever he ought

to be condemned to pay in accordance with good faith?"; or in this: "Will you indemnify me?" 1. Lessor and lessee of a farm agreed that Seius the lessee not be expelled unwillingly from his farm during the term of lease, and that, if he were expelled, Titius the lessor should owe Seius the lessee a penalty of ten; conversely, Seius the lessee should, likewise, pay ten to Titius the lessor if he wishes to leave within the term of lease. They respectively stipulated this arrangement. Should Seius the lessee not pay his rent for two years running, can he be expelled without danger of incurring the penalty? Paul responded: Although nothing was expressly said in the penal stipulation about payment of rent, still it is likely that they agreed about not expelling the tenant within the fixed term on the condition that he pay the rent and cultivate as he ought. Accordingly, if a person who did not fulfill the duty to pay rent then tries to claim the penalty, the lessor will benefit from the defense of fraud. 2. Paul responded that if a slave is assigned "on appraisal" to a woman tenant farmer, she assumes the risk for him; accordingly, if he dies, the tenant's heir ought to pay his appraised worth.

55 PAUL, *Views, book 2:* When storerooms are broken into and ransacked, the owner of the storerooms is not liable unless he accepted their safekeeping; nonetheless, the slaves of the person with whom the contract was made can be summoned for questioning due to their familiarity with the building. 1. If the lessee on a hired farm should with his own labor increase, build, or start something that is required or beneficial, then even though they had not agreed on [his doing] this, he can bring an action on hire to recover his expenses. 2. A person who, contrary to a lease clause, abandons his farm without legal and probable cause before the term [is over] can be sued on the lease for payment of the rent for the remaining term to the extent that the lessor preserves his compensation up to the amount of his interest.

56 PAUL, *Duties of Prefect of the City Guard, sole book:* When lessees do not show up for a long time and do not pay rent during this period, if the owners of storerooms and apartment buildings wish to open them and inventory what is there, they should receive a hearing before the public officials charged with this. In a matter of this kind, a period of two years should be observed.

57 JAVOLENUS, *From the Posthumous Works of Labeo, book 9:* The owner of a house leased the lot beside his house to his next-door neighbor; the neighbor, while constructing on his own property, piled earth on the lot up to a level higher than the lessor's quarry-stone foundations. This earth was soaked by continual rainstorms, and when

the lessor's wall became wet from the seepage of moisture, the structure collapsed. Labeo says that there is only an action on lease; for it was not the pile of earth itself that did the damage, but rather the moisture coming from this pile; the action for wrongful damage lies only for situations whereby a person suffered loss without some other external cause supervening. I concur in this view.

58 LABEO, *Posthumous Works, Epitomized by Javolenus, book 4:* You leased out an entire apartment building for a single price and then sold it with the proviso that the rents of the urban tenants fall to the buyer. Although your lessee leased it out for a higher price, nevertheless what falls to the buyer is what your lessee would owe you. 1. In the lease of a job, it was not specified by what date it should be completed; the contractor had then promised that if it were not completed according to specifications, he would pay money equivalent to the lessor's interest. I think this obligation is contracted for whatever a reasonable man would estimate concerning a time limit; they obviously arranged that it be completed within this time limit without which performance would be impossible. 2. A man in a municipality had undertaken to furnish a bath in exchange for twenty coins a year; the parties had agreed that one hundred coins be provided to him for the repair of the furnace, pipes, and such things. The contractor sued for the one hundred coins. I rule that the money is owed to him if he gives security that it is spent for the repairs in question.

59 JAVOLENUS, *From the Posthumous Works of Labeo, book 5:* Flaccus contracted to have Marcius build a house; after part of the job was finished, the structure was shaken by an earthquake. Massurius Sabinus [says that] if this occurs due to a natural force like an earthquake, Flaccus bears the risk.

60 LABEO, *Posthumous Works, Epitomized by Javolenus, book 5:* When a house has been leased out for many years, the lessor should provide not just that the lessee can dwell in it from the first of July of each year, but also that he can, if he wishes, lease to a lodger during his term. Hence, if a house under repair from the first of January remained so on the first of June, such that no one could live in it nor show it to a third party, [Labeo responded that] the lessee would not be held responsible to the lessor and this to the extent that he cannot even be forced to dwell in the repaired house from the first of July, except if the lessor were ready to offer him a comfortable house to live in. 1. I think that a tenant farmer's heir, though not himself a tenant farmer, nonetheless possesses for the owner. 2. A fuller lost your clothing; there is a third party from whom you may claim them, but you do not choose to reclaim them. Despite this you sue the fuller on the lease. But [Labeo thinks that] the judge would determine whether you can better proceed against the thief and obtain your property from him, at the fuller's expense, of course; but if he observes that this is impossible for you, then he will make the fuller pay you but will force you to provide him with your actions. 3. The construction of a house had been leased out under the contract proviso that the lessor or his heir have the right to approve or disapprove; the contractor had altered some parts of the job at the lessor's request. I responded that the job was evidently not performed in accordance with the contract, but that since the change was at the lessor's request the contractor should be released from liability. 4. I ordered you to estimate how much money you would want to build a villa; you formally notified me that you estimated an expense of two hundred. I leased out the job to you for a fixed fee, and later learned that the villa could not be completed for less than three hundred. You had been given one hundred; when you had spent part of it, I

forbade you to do the job. I ruled that if you persist in this job, I may sue you on the lease [of a job] to force your return to me of the remaining money. 5. While a tenant farmer was inspecting the harvest, you removed it knowing it belonged to another. Labeo says that the owner can bring a *condictio* against you for the grain and that the tenant will have an action on the lease to force the owner to do this. 6. The lessor of a warehouse had a rule that he did not accept gold, silver, or pearls at his own risk; but then he let it pass when he knew such goods were brought in. I decided that he would be under obligation to you, and if he had this rule, it is apparently rescinded. 7. You hired my slave as a muleteer; due to his carelessness your mule died. If he leased himself out, I [Labeo] decide that I will be held responsible to you for the loss up to the value of his *peculium* or the amount of benefit I took; but if I leased him out, I will be held responsible to you for no more than the absence of my bad faith and fault. If you hired a muleteer from me without specifying the particular person and I gave you the man through whose carelessness the mule died, I think that I will be held responsible to you for fault in that as well, since I chose the one who caused you the loss in question. 8. You hired a carriage to transport your freight and then to return. When it crossed a bridge, the tax-farmer of the bridge collected a customs duty from him. Will he also pay the duty for the carriage alone? I think that if the muleteer was not unaware that he would cross by this point when he leased out the carriage, then the muleteer should pay it. 9. The warehouseman should be held responsible to lessees for safekeeping of their property; but I do not think that the lessor of the entire warehouse should be held responsible to the warehouseman, unless they agreed otherwise in making the lease.

61 SCAEVOLA, *Digest, book 7:* Although the contract of lease did not specify that he set out vines, a tenant farmer nonetheless planted vines on his farm; due to their produce the land began to be leased for ten gold pieces more per year. If the owner expels the tenant of his farm and sues him for unpaid rent, can he, by interjecting the defense of fraud, counterclaim for his beneficial expenses in setting up the vines? He [Scaevola] responded that either he will obtain his expenses or he will have no further responsibility [to the lessor]. 1. A man hired a ship to sail, for a fixed fee, from the province of Cyrene to Aquileia; the cargo was three thousand *metretae* of olive oil and eight thousand *modii* of grain. It turned out, however, that the loaded ship was detained in that province for nine months and the cargo was unloaded and confiscated. Can the ship collect from the lessee the passage money agreed on in the lease? He [Scaevola] responded that in a situation like this one he can.

62 LABEO, *Plausible Views, book 1:* If you undertook on hire the creation of a channel and then made it, but subsidence ruined it before you had it approved, the risk is yours. PAUL: On the contrary; if this occurred due to a fault in the earth, the lessor will bear the risk. But if it happened due to a fault in the construction, the loss will be yours.

3

THE ACTION FOR BROKERAGE[3]

1 ULPIAN, *Edict, book 32:* The action for brokerage was created to remove a doubt; when an appraised object is delivered for sale, there was once considerable question whether there is an action on sale due to the appraisal, or one on lease on the theory that I am construed to have leased out the sale of the object [as a job], or one on hire on the theory I hired labor, or one on mandate. It seemed preferable to create this action; for whenever there is confusion about the name of a contract but a consensus that some action does lie, an *actio praescriptis verbis* for brokerage should be granted, since this is a civil transaction arranged in good faith. Accordingly, everything stated above concerning contracts of good faith is relevant here too. 1. In brokerage the risk lies with the person who assumed it [the broker]; he must return either the object itself undamaged or else the appraised price that they agreed on.

2 PAUL, *Edict, book 30:* This action is used also if there is a fee [for the brokerage].

4

BARTER

1 PAUL, *Edict, book 32:* Just as selling is distinct from buying and the buyer from the seller, so too the price is distinct from merchandise. But in barter it is impossible to distinguish who is buyer and who is seller, their duties being very different. The buyer is liable on sale if he does not make the recipient the owner of the money, whereas the seller need only obligate himself in the event of an eviction, deliver the possession, and remain free of bad faith, and thus he owes nothing if there is no eviction from the object. But in barter, if both things are price, then they must become the property of each party, and if merchandise, then they need not become the property of either. But since there should be both an object and a price, [barter] cannot [be sale and purchase, for there is no way] of knowing which thing is merchandise and which price, nor does common sense allow that one and the same thing be both the object sold and the price of purchase. 1. Hence, if there is an eviction from a thing which I previously received or gave, a [jurist's] response will be that an *actio in factum* should be granted. 2. Again, the contract of sale and purchase is contracted by the bare will of the parties in reaching agreement, while barter leads on to an obligation [only] when an object is delivered. Otherwise, if the object were not yet delivered, we will rule that the obligation was contracted by mere agreement, something which is reserved only for those contracts which have their own name, like sale and purchase, hire, and mandate. 3. Therefore, Pedius says that a person who delivers a third party's object does not validly contract a barter. 4. And so if delivery is carried out on one side and the other party declines to deliver, our suit is not [for return to us] of the [delivered] object, [but rather for] our [interest] in receiving the thing agreed on; however, there is [also] a *condictio* to get the object returned on the theory of nonreciprocation.

2 PAUL, *Plautius, book 5:* Aristo says that since barter is akin to purchase, there should be a warranty that a slave given for this reason is healthy, free of thefts and delicts, and not a runaway.

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3. *Aestimatum.* In this contract-form, the owner entrusts his object to a kind of merchandise broker (*aestimatorius*) who agrees to return either the object itself or the purchase price set by the two parties; usually the broker seeks to sell it to a third party for a higher price, the difference then being retained by him. The existence of a special edictal action on this contract is the subject of on-going debate.

5

THE *ACTIO PRAESCRIPTIS VERBIS* AND THE *ACTIO IN FACTUM*[4]

1 PAPINIAN, *Questions, book 8:* Sometimes it happens that the instituted forms of litigation and the normal actions are inapplicable, and so we cannot find an appropriate basis of action; then we may readily resort to *actiones in factum.* But let me briefly discuss this so my point does not go unillustrated. 1. Labeo writes that a civil-law *actio in factum* should be given to the owner of cargo and against a ship captain when it is unclear whether he hired the ship or leased out the transporting of cargo [as a job]. 2. Likewise, if a man hands over his property to get an estimate of its price, neither a deposit nor a loan for use will result. But if the other party acts dishonestly, a civil-law *actio in factum* is substituted.

2 CELSUS, *Digest, book 8:* For when the normal and well-used bases of action fail us, suit must be brought *praescriptis verbis,*

3 JULIAN, *Digest, book 14:* to which action we must resort whenever contracts arise whose names were not instituted in civil law.

4 ULPIAN, *Sabinus, book 30:* For it is implicit in the nature of reality that there are more types of transactions than names for them.

5 PAUL, *Questions, book 5:* My natural son is your slave and yours is mine. We agreed that you manumit my son and I yours; I manumitted but you did not. Through what action are you liable to me? As regards this question, an overview may be presented concerning everything that is given for a purpose. They arise in these forms: Either I give to you in order that you give or I give that you do or I do that you give or I do that you do; among these forms what obligation is incurred? 1. If I give money in order to get something, this is sale and purchase. But if I give a thing in order to get a thing, then because in the prevailing view the barter of objects is not sale, there is no doubt that a civil-law obligation does arise; and in this action the issue will not be that you return what you took, but rather that you recompense me for my interest in getting the object we agreed on. Or, if I should wish to recover my property, then what was given should be reclaimed on the theory of nonreciprocity of objects. But if I gave my goblets to you in order that you give me Stichus, Stichus will be at my risk [before delivery] and you should be held responsible for your fault only. The section "I give in order that you give" is completed. 2. But when I give in order that you do, if the act is of a kind such as is normally leased out, for example, that you paint a picture, there will be a lease if money is given, just like the sale in the case above; while if I give an object, there will be no lease, but what will arise is either a civil-law action for my interest or a *condictio* to reclaim [the object]. But if the action is such that it cannot be leased out, for example, that you manumit a slave, a *condictio* for it [the object given] or an *actio praescriptis verbis* can lie if a fixed time limit for manumission was attached and this has expired while the slave lived, and so manumission would have been possible; and, likewise, if it [the time limit] was undefined but so much time has passed that manumission can and should occur. This corresponds to what I said above. But if I gave you a slave in order that you manumit your slave, and you did manumit him but then through eviction you lost the slave I gave you, Julian writes that if I gave him knowingly, an action on fraud should be granted against me, and if unknowingly, a civil-law *actio in factum.* 3. But if I do in order that you give, and then after I acted you fail to give, there will be no civil-law action, and so one for fraud will be granted.

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4. *Note on terminology.* Titles 19.3 and 4 both reflect problems that arose from the closed list of classical contracts. Already in the classical period both praetors and jurists began to open the law, by devising exceptional *actiones in factum* (literally, "on the case") through analogy with the body of civil-law contracts; hence, they came to be called civil-law *actiones in factum* (or civil-law actions for an indefinite sum), and many generalized rules of liability from contract law were applied to them as well. In the postclassical period, the *actio praescriptis verbis* was generalized to refer to this broad category of actions; it takes its name from a (classical) judicial preamble describing the special circumstances leading to the action. The consequence was a move toward a generalized theory of contract, which the classical jurists probably already envisaged. The texts in this title, however, were drawn together by the compilers from divergent sources and are at times remanaged in the light of later theory.

4. But if I do in order that you do, this type allows much discussion. If we agreed that you collect from my debtor at Carthage and I from yours at Rome, or that you build on my land and I on yours, and I built while you fail [to build], in the former case a mandate evidently intruded to some extent; money cannot be collected for someone else without mandate. Even though expenses are included, still we provide a service for one another, and through agreement a mandate can even excede its own nature [as a contract], since I can give you a mandate that you both provide me with safekeeping [of an object] and not spend more than ten in collecting. If we both spent the same amount, there is no problem. But if one party did [what he undertook to build, while the other did not, the one who did not can be compelled to build,] so that here too a mandate has evidently intruded; the theory is that we reciprocally reimburse expenditures, and not that I give you a mandate concerning your own property. But it will be safer both in the case of constructing buildings and in that of collecting from debtors that an *actio praescriptis verbis* be accorded, an action which is similar to the action on mandate, just as in the previous cases [the action was similar] to lease and purchase. 5. If these remarks are true when both sides agree on doing something, then also in the question under discussion the same can be said, and it necessarily follows that he be condemned for my interest in having the slave whom I manumitted. Should deduction be made because I have a freedman? But [the value of] this cannot be estimated.

6 NERATIUS, *Replies, book 1:* I sold a building in the following manner: that you repair another building. He responded that there is no sale, but that action must be brought with a civil-law *intentio* for an indefinite sum.

7 PAPINIAN, *Questions, book 2:* If I give you ten to manumit Stichus and you fail to do so, I may bring an immediate *actio praescriptis verbis* to force you to pay my interest; or, if there is no interest, I may bring a *condictio* for your return of the ten.

8 PAPINIAN, *Questions, book 27:* If a slave is accused of theft and his owner surrenders him "on appraisal" in order that an inquiry be held, and then nothing is learned about him but he is not returned, [a jurist held that] action can be brought in civil law for this, although [to be sure] in some circumstances the person who had accepted [the slave's] delivery would have kept the slave; he can keep the slave if the owner had preferred money for him or if he had been captured in the very act, and in the latter case [the jurist ruled that] the amount of the appraisal, if already paid, must also be returned by the [slave's] owner. But through what action could the money be claimed if the owner had preferred money? I held that even if what they arranged was not covered by the formal words of a stipulation as well, nonetheless if the contract clause is obvious, an *actio praescriptis verbis* for an indefinite sum can be brought in this case too; and a mere pact is not construed as having arisen between them whenever it is shown to be established with a fixed clause.

9 PAPINIAN, *Replies, book 11:* A man was discharged from a debt by formal release in exchange for his assigning the account of Titius his debtor; if he should fail to carry out the contract, he will be liable in an action for an indefinite sum. So, at the judge's discretion, the old obligation will not be revived; but [either] he will take responsibility for his promise or a condemnation will ensue.

10 JAVOLENUS, *Letters, book 13:* A man legated [to his wife] the usufruct of one third of his estate. The property of the heir was then sold up by his creditors; the woman received, for her enjoyment, the money that resulted from an appraisal of her third, but the stipulation was omitted due to ignorance [of the law]. Can the money which was paid for her enjoyment be reclaimed from the wife's heirs, and if so by what action? I responded that an *actio in factum* should be accorded.

11 POMPONIUS, *Quintus Mucius, book 39:* Because the body of actions is not complete, *actiones in factum* are frequently needed. But if a statute is just and necessary, the praetor will supplement the actions instituted by statutes in areas where the statute is lacking; he does so in the case of the *lex Aquilia* by according *actiones in factum* adapted to the *lex Aquilia*, something that is required for the statute to be beneficial.

12 PROCULUS, *Letters, book 11:* A man sold farms to his wife; included in the contract of sale was their agreement that if she ceased to be married to him, the woman would,

if he wished this, make over these farms to him for the same price. I think an *actio in factum* should be accorded, and that this rule should hold for other persons as well.

13 ULPIAN, *Sabinus, book 30:* If I had given you an object to be sold at a set price with the proviso that you keep whatever you sold it for above this figure, it is agreed that there is no action on mandate nor one for partnership, but rather one *in factum* on the analogy of other unauthorized administration. Mandates should be gratuitous; and evidently, a partnership was not contracted in the case of someone who does not take you as his partner in the sale, but instead reserves a fixed price for himself. 1. If I give you ownership of my lot in exchange for your returning a part to me after a building is constructed, Julian, in the eleventh book of his *Digest*, writes that there is no sale since I receive part of my own property instead of a price; nor is there mandate since it is not gratuitous; nor is there partnership since one does not cease to own his own property in contracting a partnership. But if I entrust to you the pasturing of a herd or the training of a slave-boy with the proviso that we share the price should they be sold after a fixed number of years, [Julian writes that] these facts are different from the case of the lot in that the former owner does not cease to be the owner; hence, an action for partnership lies. But if, for example, I had made you owner of the boy, [I think] he would say the same as with the lot, since ownership ceases to belong to the first owner. What is the result? Julian thinks that an *actio in factum* should be accorded, that is, *praescriptis verbis*. Therefore, if someone does not transfer ownership of the lot, but allowed you to build with the proviso that either it or its price be shared, there will be a partnership. Likewise, if he transfers ownership of part of the lot, but not of the rest and allowed construction under the same condition.

14 ULPIAN, *Sabinus, book 41:* In order to save his own cargo a man hurled another's cargo into the sea; he is not liable in any action. But if he had done this for no reason, he is liable *in factum*, and if maliciously, for fraud. 1. But again, if someone stripped another's slave who then died of exposure, there may be an action on theft as regards the clothing, but as regards the slave the action must be *in factum*, the criminal penalty against him having been [also] reserved. 2. But again, if a man, intending to do harm and not to make a profit, tossed another's silver cup into the sea, Pomponius, in the seventeenth book of his *Sabinus*, wrote that neither the action on theft nor that for wrongful harm lies; action must be brought *in factum*. 3. If acorns from your tree fall on my farm and I let loose my herd on them and consume them, Aristo writes that he knows of no statutory action by which I may claim my rights; for there can be no action from the *Twelve Tables* for the grazing of cattle since the pasturing was not on your land, nor one for *pauperies*, nor one for wrongful damage. Hence, the action must be brought *in factum*.

15 ULPIAN, *Sabinus, book 42:* When people know that runaway slaves are being hidden somewhere, they often point them out to their owners where they are hidden; this act does not make them thieves. They often even receive a fee for this act and point out [runaways] on that condition; this payment is also not considered illegal. Therefore, the recipient, because he receives [money] for a reason that is not immoral, does not fear a *condictio*. But what if nothing was paid [in advance], but there was an agreement about a reward, that is, that a fixed sum would be paid if he pointed out the runaway and he was then caught? Can he bring an action? This agreement is not a bare one such as requires the ruling that no action arises from agreement [alone]; it has a bit of reciprocal transaction in it. Hence, a civil-law action can arise, that is, *praescriptis verbis*, except if someone might say that the action for fraud lies in this case as well, where a kind of fraud is alleged.

16 POMPONIUS, *Sabinus, book 22:* You allowed me to excavate clay from your land, with the condition that I fill in my excavation. I did excavate, but do not then fill it in; what action do you have? But it is settled that a civil-law action for an uncertain amount lies. If you sold the clay, you will sue on the sale. But if I fill in after the clay's excavation and you do not then allow me to remove the clay, I can bring an action for production since it became mine when it was excavated in accordance with your wish.

1. You gave me permission to sow on your farm and to remove the [resulting] crop. I sowed, but now you do not allow me to remove the crop. Aristo says that there is no action at civil law, and that it can be doubted whether one *in factum* should be granted. But there will be one for fraud.

17 ULPIAN, *Edict, book 28:* If I give you a free dwelling, may I bring an action on loan for use? Vivianus, indeed, says that this is possible; but it is safer to sue *praescriptis verbis.* 1. If I gave you pearls "on appraisal" with you to return to me either the same pearls or their price, but they are then destroyed before a sale [is arranged], who bears the risk? Labeo says and Pomponius wrote the same that the risk is mine if I as seller asked you [to inspect them], but yours if you asked me. If neither of us [asked the other], but we merely agreed, you are liable to the extent of being responsible to me for your fraud and fault. In this case, there will be, in any event, an *actio praescriptis verbis.* 2. Papinian, in the eighth book of his *Questions,* wrote: "If I gave you an object for your inspection and you say you had lost it, I have the *actio praescriptis verbis* provided that I do not know where it is; for if it should be clear to me that it is in your house, I can bring an action for theft or a *condictio* or an action for production." Accordingly, if I gave a thing to someone for his inspection, whether in his own interests or in that of us both, I rule that for practical reasons he is held responsible to me for his fraud and fault, but not for the risk; but if it was given in my own interests, [he is held responsible] only for fraud because this is virtually a deposit. 3. My neighbor and I each have a cow. We decide that for ten days apiece we will lend our cows to each other to do a job. A cow died in the hands of the other person. Because the loan was not gratuitous, the action on loan for use does not lie, and action must be brought *praescriptis verbis.* 4. You are selling clothes to me, and I ask that you leave them with me, so I can show them to experts; but they are then destroyed due to the higher force of a fire or the like. [A jurist holds that] I am not held responsible for this risk, whence it is clear that in any case I do have a duty of safekeeping. 5. If someone receives rings because of a *sponsio* [between two claimants of ownership] and does not return them to the winner, an *actio praescriptis verbis* lies against him. The opinion of Sabinus should not be accepted; he thinks that there is a *condictio* and an action for theft in this case. But how will the victor bring an action for theft for a thing of which he had neither possession nor ownership? To be sure, if the reason for the *sponsio* was dishonest, there will be at least a claim to get his ring back.

18 ULPIAN, *Edict, book 30:* I deposited money with you to pay to Titius if he had returned my runaway [slave]; you do not pay it because he did not return [the slave]. If you should not return the money to me, it is better to sue *praescriptis verbis*; for I and the slave-catcher did not both deposit the money, for example, as there would be a deposit with a stakeholder.

19 ULPIAN, *Edict, book 31:* You asked me to give you money on loan; I did not have the money, but gave you an object for you to sell and use the price of. If you did not sell it or did sell it but did not take the money as a loan, it is safer, as Labeo says, to bring an *actio praescriptis verbis,* on the theory that the transaction of a unique contract occurred between us. 1. If I obligated my property [as security] on your behalf, and we then agreed that you furnish me a verbal guarantor but you do not do so, I rule that it is better to sue *praescriptis verbis* unless we established a fee between us; if there was a fee, there is an action on lease.

20 ULPIAN, *Edict, book 32:* In Labeo there is this problem: If my horses are for sale and I give them to you with the condition that you return them if within three days you are not satisfied and you then ride them in an acrobatic contest and win but then decide not to buy them, is there an action on sale against you? I think the more correct view is that action must be brought *praescriptis verbis*; for we arranged that you receive a free trial, not that you also compete [with them]. 1. Again, in Mela there is this problem: If I give you mules on trial with the condition that you buy them if you

are satisfied and pay an amount for each day if you are not, but then the mules are stolen by robbers during the trial period, which are you held responsible for, the price and the rent or just the rent? Mela says that it makes a difference whether or not the sale had been concluded in that if it was concluded the price may be claimed, but if not, the rent may be claimed; but he says nothing as to the actions. I think that if the sale was complete, an action on sale lies; but if it were not yet complete, then an action like that against the acrobat is accorded. 2. You wish to buy silver. A metalworker brought some to you and left it; then, because you had not liked it, you gave it to your slave to return, and it was then destroyed due to no bad faith or fault on your part. [A jurist holds that] the metalworker bears the loss since it was sent for his benefit as well. Labeo says that you must obviously be held responsible for the fault of those to whom you entrusted its safekeeping and transport; I think an *actio praescriptis verbis* lies for this.

21 ULPIAN, *Disputations, book 2:* Whenever an action or a defense is lacking, an *actio utilis* or an adapted form of defense is available.

22 GAIUS, *Provincial Edict, book 10:* I give you clothes for cleaning or mending. If you undertake this work for free, the obligation is in mandate; but if a fee was paid or agreed upon, then the transaction is lease and hire. But if you do not undertake this work for free and no fee was given or agreed upon, but the transaction is instead undertaken with the intention that whatever amount we would have agreed on be paid afterward as a fee, the accepted view is that an *actio in factum*, that is, *praescriptis verbis*, be accorded on the theory that a new kind of transaction is involved.

23 ALFENUS, *Digest, Epitomized by Paul, book 3:* Two men were walking along the Tiber. One of them, at the request of his walking companion, showed him a ring for his inspection; the ring escaped his [the companion's] grasp and rolled into the Tiber. He [Servius] responded that he can be sued through an *actio in factum*.

24 AFRICANUS, *Questions, book 8:* Titius gave thirty to Sempronius. They arranged that out of the profit from this money Sempronius, after reckoning the six percent interest, would pay taxes owed by Titius; further, that if the taxes were smaller, he would return to Titius the difference between the taxes and the amount of interest; but that if the tax payment was more [than the interest], then the principal would be decreased by the difference, or Titius would owe Sempronius the excess if the total tax exceeded both principal and interest. There was no stipulation between them on this matter. Titius inquired by what action he could obtain from Sempronius the amount of interest Sempronius received over and above what he paid as tax. He [Julian] responded that interest is not owed on money which is lent unless this is reduced to a stipulation; but in the hypothetical case one ought to note that it should be construed less as money lent at interest than as a kind of mandate contracted between them, except for what he [Sempronius] might get beyond the six percent. But [Julian said that] not even the claim to the principal itself was a claim for money lent, since it must be ruled that if Sempronius without acting in bad faith had either lost this money or held it idle, he would have owed nothing on this score. Therefore, [Julian ruled that] the safest course is that an *actio praescriptis verbis in factum* be accorded, especially since the parties also agreed that whatever he paid over and above what he obtained from the interest would decrease the principal; this oversteps both the law and the nature of loans of money.

25 MARCIAN, *Rules, book 3:* If a person had given the labor of his slave craftsman in exchange for his receiving an equivalent amount [of labor], [a jurist ruled that] he can sue *praescriptis verbis*, just as if he gave cloaks to get tunics; nor is it a contradiction that if the labor had not been owed and was given in error, it cannot be reclaimed. For

by the law of nations we can be obligated by giving one thing for the return of something else; but if something unowed is given, either it or an equivalent amount of the same kind can be reclaimed, but labor cannot be reclaimed under either heading.

26 POMPONIUS, *Sabinus, book 21:* If I gave you goblets with the condition that you return them to me, there is an action on loan for use; if that you return a weight of silver equal to them, there is a claim through an *actio praescriptis verbis* for an equivalent weight, but for silver as good as they themselves were. But if we agreed that you return either these cups or their weight in silver, the same must be said.

BOOK TWENTY

FORMATION AND TERMS OF *PIGNUS* AND *HYPOTHECA*[1]

1 PAPINIAN, *Replies, book 11:* A general agreement in a mortgage to cover future acquisitions is recognized. But if the agreement covers specific property of another not then owed to the debtor but later acquired by him, the creditor who knew that it was not his is not so easily given a *utilis actio* for it, and it is easier for the possessor to keep it. 1. The creditor cannot sell the *peculium* of a mortgaged slave without a special agreement to that effect. It does not matter when the slave acquired the *peculium* for his owner. 2. In a mortgage of land, it was specially agreed that fruits should be included in the mortgage. A purchaser in good faith is not bound to account in a *utilis* Servian action for such fruits, if consumed. For though prescription does not destroy a mortgage of the land itself, since the validity of the mortgage is independent of changes of owner, these fruits are different, as they were never owned by the debtor. 3. There was a clause that if interest was not paid on time, fruits of the mortgaged property should be set off against interest up to the statutory limit. Though the initial stipulation was for lesser interest, the clause is not held invalid. Lawful higher interest could properly be promised in the event of failure to pay less on time. 4. A wife gave her husband land, and the husband mortgaged it. After divorce, the woman recovered the land and mortgaged the same land for her husband's debt. Clearly, the mortgage was valid only for the amount which the woman was bound to offer her husband for improvements, that is, the excess of expenditure over the fruits taken by the husband from the land. To that extent the woman acted for herself, not for another.

2 PAPINIAN, *Replies, book 3:* If a surety takes over properties by way of *pignus* or *hypotheca* and on that basis pays and then sues or is sued for mandate, his negligence must be taken into account, like that of a creditor. But he cannot be sued in an action on mortgage.

3 PAPINIAN, *Questions, book 20:* Even if the debtor sues as owner and, since he cannot prove ownership, loses, the creditor can still bring the Servian action if he shows that the property formed part of the debtor's assets at the time of the mortgage agreement. Again, if the debtor loses in a claim for an inheritance, the judge in the Servian action must examine the mortgage claim without regard to the decision on inheritance. It is different as regards legacies and claims for freedom, if the decision has

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1. *Pignus* is sometimes used of a real security over land or movables accompanied by possession; *hypotheca*, of a real security not accompanied by possession. Generally, however, the texts use the expressions indiscriminately and treat them as equivalent. I have translated both terms in general by "mortgage"; the reader should, therefore, bear in mind that "mortgage" is used in the translation in a sense which includes a chattel mortgage. Exceptionally, however, (1) the compound phrase *pignus et/vel hypotheca* has been translated "*pignus* or *hypotheca*"; (2) the landlord's tacit hypothec for the rent has been termed a "hypothec" though the texts call it a *pignus*; (3) when the context implies that the creditor has already taken possession of movables by way of security, *pignus* has been translated "pledge."

gone in favor of one who claimed as statutory heir. The creditor is not altogether comparable with a legatee, since legacies are valid only if the will is valid. It may happen that a valid mortgage is made but that the debtor's suit is defective. 1. One who undeservedly lost an action later mortgaged the property which he had claimed. The creditor can have no greater right than the debtor. So he will be defeated by the plea of *res judicata*, although the successful defendant can bring no action of his own. The point to consider is the right of the debtor who made the mortgage, not the lack of right of the successful defendant.

4 GAIUS, *Action on Mortgage, sole book:* A mortgage is made by consent, when someone agrees that his property will be bound by way of mortgage for some obligation. As in consensual contracts, it does not matter what words are used. So if an agreement for a mortgage not in writing can be proved, the property will be bound as agreed. The purpose of writing is to prove the transaction more easily, but if it can be proved otherwise, it is valid without writing, like an undocumented marriage.

5 MARCIAN, *Action on Mortgage, sole book:* Property can be mortgaged for any obligation, such as loan, dowry, sale, hire, or mandate, whether immediate, future, or conditional and whether the contract is present or past. It can also be mortgaged for a future obligation; for part as well as the whole sum; and for a civil, praetorian, or natural obligation. The property is liable for a conditional obligation only if the condition is fulfilled. 1. The difference between *pignus* and *hypotheca* is purely verbal. 2. A person can give a mortgage for his own obligation or another's.

6 ULPIAN, *Edict, book 73:* A general mortgage of present and future assets does not cover things which someone is unlikely to mortgage specially. Thus, the debtor must be allowed to keep household equipment, clothing, and slaves so employed that he would certainly not want to mortgage them, for example, in services essential to him, or with whom he was on affectionate terms.

7 PAUL, *Edict, book 68:* And the Servian action does not lie for slaves in everyday service.

8 ULPIAN, *Edict, book 73:* Lastly, a mistress, natural child, or foster child, and anyone in a similar position is excluded.

9 GAIUS, *Provincial Edict, book 9:* The same is true of assets which he did [not] have in his estate when he made the agreement. 1. What can be sold can be mortgaged.

10 ULPIAN, *Edict, book 73:* If a debtor mortgages his assets to two persons at once, the whole to each, they can both sue third parties by the Servian action for the whole, but in a matter between themselves, the possessor prevails, since the possessor has the defense "unless it was agreed that the same things should be mortgaged to me." However, if it was agreed that shares of the assets should be mortgaged, an *actio*

utilis will lie both against third parties and between the mortgagees to get possession of a half share.

11 MARCIAN, *Action on Mortgage, sole book:* The lawful administrator of a *res publica* who takes a loan on its behalf can bind its property. 1. If an agreement is made for fruits in lieu of interest and a tenant is put in the land or house, the creditor retains possession by way of mortgage until the capital is paid to him, since he takes fruits in lieu of interest either by letting the property or living there and taking them himself. So if he loses possession, he can bring an *actio in factum.* 2. Can a usufruct be pledged or mortgaged either by an owner or a usufructuary? Papinian, in the eleventh book of his *Replies*, writes that the creditor should be protected and that if the owner wants to sue the creditor on the basis that "he has no right to use or enjoy the property without the owner's consent," the praetor will give the latter the defense "unless the creditor and usufructuary have agreed that the usufruct should be mortgaged." Since the praetor protects the buyer of a usufruct, why not the mortgagee? For the same reason there is a defense against the debtor. 3. Urban servitudes cannot be mortgaged, so there can be no valid agreement to mortgage them.

12 PAUL, *Edict, book 68:* Is an agreement to mortgage a right of way [in person or with cattle] or of aqueduct valid? Pomponius says that we must frame the agreement so that until payment the creditor, having neighboring land, can exercise these servitudes and, if not paid by a certain day, sell them to a neighbor. His opinion should be accepted in view of the benefit to the parties.

13 MARCIAN, *Action on Mortgage, sole book:* If a flock is mortgaged, later born animals are included. Indeed, if the whole flock dies and is renewed, it remains subject to mortgage. 1. A *statuliber* can be mortgaged, though, if the condition is fulfilled, the mortgage ends. 2. Since it has been held that mortgaged property can be given in mortgage, the property is bound to the second creditor to the extent that both sums are owing, and he has both a defense and an *actio utilis.* But if the owner pays the debt, the mortgage ends too. However, there may be a doubt whether the creditor should have an *actio utilis* for the coins paid over. And suppose a specific object is given in payment? The truth is, as Pomponius, in the seventh book of his *Edict*, says, that if a debtor whose debt is mortgaged owes money, the creditor, once the debt is realized, sets it off against his own claim. But if an object is owed and paid, it will be mortgaged to the second creditor. 3. As regards surface rights, the creditor can properly sue any possessor, whether there was merely agreement on a mortgage or whether possession was given and later lost. 4. Although the creditor obtains judgment against the debtor, the mortgage continues, since the action on mortgage has its own rules and ceases only on payment or satisfaction. So if I bring a personal action against the debtor, the mortgage remains even if he gives security and is held liable. Still more does the mortgage remain if a personal action is brought against a defendant or surety or against both for a share, though they are held liable. The mere fact that he has the action on judgment does not amount to satisfaction. 5. If there is a mortgage for a conditional debt, suit cannot properly be brought before the condition is fulfilled, since nothing is yet owing. If the condition is fulfilled, he will be able to sue. If the debt is immediate and the mortgage conditional, and the action on mortgage is brought before the condition is fulfilled, the position is that the money has not been paid and it would be unfair to terminate the mortgage. Hence, a deed should be given

at the judge's bidding "that if the condition is fulfilled and the money not paid, the security, if it then exists, should be handed over." 6. If something is mortgaged for interest, interest must be paid; the same applies to a penalty.

14 ULPIAN, *Edict, book 73:* The question put is whether if the rent is not yet due, the action on mortgage should be given. I think that the action for possession of the mortgaged property should be given since, as Celsus writes, I have an interest in it. 1. When a natural obligation persists, so does the mortgage.

15 GAIUS, *Action on Mortgage, sole book:* Future property can be mortgaged, for example, unharvested crops, offspring of a female slave, and the young of animals once born. This is true, as Julian writes, whether it is the owner who agrees as regards the use and fruits or the birth of young or the usufructuary. 1. When it is said that the creditor should verify, when he makes the agreement, that the thing is in the debtor's estate, this applies to a special mortgage, not to the clause commonly inserted in deeds that besides the property specially mortgaged, the debtor's remaining assets, present and future, are bound as if especially mortgaged. 2. Those who mortgage their assets to a second creditor and want to avoid the danger of those who give multiple mortgages usually declare that the property is mortgaged to no one except, say, Lucius Titius, and that the thing is mortgaged for the excess over the previous obligation, and, when the thing is released from the prior debt, for the whole. Is this also the position if it is simply agreed that the thing is mortgaged for the excess? When the first creditor is paid off, is mortgage for the whole implicit in the agreement or just for part? Rather the former.

16 MARCIAN, *Action on Mortgage, sole book:* If land is mortgaged and then increases by alluvion, the whole is bound. 1. If something is mortgaged without the owner's knowledge and the owner later ratifies, the mere fact of ratification is treated as showing that he wished the ratification to relate back to the time of agreement. The intention to be regarded is almost exclusively that of the person who has the right to mortgage. 2. If property mortgaged is later altered, the action on mortgage still lies, for example, if a house is mortgaged and made into a garden or if a site is mortgaged and a house built or vines planted. 3. In an action for mortgaged property, it must be shown that the defendant possesses the thing claimed. If he does not possess it and has not dishonestly disposed of it, he should be held not liable, similarly if he possesses and either pays or hands over the property. If he does neither, he will be held liable. If he wants to hand the thing over and cannot (for example, because the property is distant or in the provinces), the matter is usually settled by a deed; for if he makes a formal promise to hand over the property, he is held not liable. If he is not guilty of dishonesty, but it is impossible for him, try as he may, to hand over the property, he will be liable for the value assessed by the plaintiff, as in other actions *in rem.* For if judgment were confined to the amount owing, what would be the point of an action *in rem,* since the same result could be achieved by suing *in personam*? 4. Sometimes the judge must take account of fruits, so that he gives judgment for fruits from the time when the action was begun, for example, if the land was worth less than the debt. But he cannot give judgment for preceding fruits, unless they are extant and the property is insufficient. 5. It is a question how the creditor can

recover mortgaged property for which judgment has been given in his favor. He cannot claim as owner. But he can bring the action on mortgage, and if the possessor raises the defense of *res judicata*, he can reply: "unless the decision was in my favor." 6. Judgment in an amount greater than capital and interest is given against the debtor for not handing over the property mortgaged. Is the mortgage ended if the debtor pays the amount owing? Going by legal subtleties and the force of the judgment, I do not think so, since the cause is merged in the judgment and money is owed on that. But on a more humane view, he can discharge the mortgage by paying the actual debt and no more. 7. A debtor can validly mortgage another's property conditionally on its becoming his. 8. If two mortgagees agree at the same time on a mortgage, does each have a mortgage proportionate to his debt or each a half share? The position is rather that each has a mortgage proportionate to his own debt. But does each sue a possessor for his part or for the whole, the property being bound to each for the whole? The latter is the case if the two mortgages were made separately on the same day. If they were made together, each can sue for the whole if it was so intended, but otherwise each for his own part. 9. It can be a term of a *pignus* or *hypotheca* that if the money is not paid by a certain date, the creditor can have the property as buyer at a fair price then to be assessed. In this case, there is, as it were, a conditional sale, as Severus and Antoninus held in a rescript.

17 ULPIAN, *Edict, book 15:* A mortgage creditor has an action *in rem.*

18 PAUL, *Edict, book 19:* If I take a mortgage from someone who has the Publician action, not ownership, the praetor protects me by the Servian action, just as he protects the debtor by the Publician.

19 ULPIAN, *Edict, book 21:* A creditor who takes a mortgage of several assets is not bound to release one until the whole debt is paid.

20 ULPIAN, *Edict, book 63:* It was agreed that one who lent money for the repair of a building should be repaid out of the rents by way of mortgage. He will be able to sue the tenants by *actiones utiles* on the strength of the deed of mortgage by the debtor in favor of the creditor.

21 ULPIAN, *Edict, book 73:* An agreement for mortgage between a farm tenant and my procurator, authorized or ratified by me, amounts to an agreement between me and my tenant. 1. If a debtor has a slave whom he bought in good faith from a nonowner and mortgaged, the Servian action lies, and if the creditor sues, he will avoid the defense by the reply of fraud. So says Julian, rightly. 2. A chance benefit or detriment to the property mortgaged goes to the debtor. 3. If the mortgaged property is not handed over, the amount due from the possessor must be assessed by the judge, but differently against the debtor and other possessors. Against the debtor, the debt, which is the extent of the creditor's interest, is the maximum. Against others, the assessment can be greater, and if there is a surplus, the creditor must return it to the debtor by the action on mortgage.

22 MODESTINUS, *Distinctions, book 7:* If I become heir to Titius, who mortgaged my property to his creditor without my knowledge, the mortgage is not thereby made directly binding, but the creditor can bring an *actio utilis* on mortgage.

23 MODESTINUS, *Rules, book 3:* A creditor may properly let lands bound to him by *pignus*. 1. A contract between absent parties can create a valid *pignus*.

24 MODESTINUS, *Rules, book 5:* A person is not forbidden to take a mortgage in an area in which he is forbidden to purchase.

25 MODESTINUS, *Rules, book 8:* If a mortgage is defective or invalid, it does not give rise to a right of retention, even if the creditor's assets go to the imperial treasury.

26 MODESTINUS, *Replies, book 4:* A surety obtained from the magistrate permission to take possession of the property mortgaged even before payment with a view to satisfying the creditors. He did not satisfy them. Now the debtor's heir is ready to satisfy the creditors. Can the surety be compelled to hand over the property? Modestinus replied that he could. 1. The father of Seius, an emancipated son, being incapacitated, persuaded his son without difficulty to write a deed in his own hand, recording that the son's house was mortgaged for a loan by Septicius to the father. The question was whether Seius, having rejected his father's inheritance, had a clean title to this among other assets. Was he in peril through having, at his father's bidding, written the deed in his own hand, though he did not consent by sealing it or by a separate writing? Modestinus replied that since Seius by his own hand wrote that his property was mortgaged, he obviously consented to the obligation. 2. Lucius Titius mortgaged lands and slaves on them. His heirs divided the lands between themselves and substituted new for dead slaves. Later a creditor sold the lands with the slaves. The question is whether the buyer can sue as owner for the slaves presently on the lands mortgaged. Modestinus replied that if the slaves were not those mortgaged nor born of mortgaged females, they were not mortgaged to the creditors.

27 MARCELLUS, *Digest, book 5:* The mortgagor of a slave chained him for a trivial offense, then unchained him. The debt was not paid and the creditor sold the slave for less. Should the creditor be given an action against the debtor, as the action on the loan does not suffice to enable him to recover the residue? Suppose the debtor to have killed him or put out his eye? If he killed him, he is liable in the action for production. If he put his eye out, we shall allow an action as if for wrongful damage to the extent that the weakening or chaining reduced the value of the action on mortgage. Imagine that because of a procedural error the action on the loan fails. I think the praetor might well take note and give a remedy. ULPIAN notes: He is liable if he chained the slave to harm the creditor, not if the slave deserved it.

28 PAUL, *Questions, book 3:* A conditional legacy was left to a son-in-power, and, as security for it, his father took a mortgage over property belonging to the heir. If the condition was fulfilled after the father's death or the son's emancipation, the legacy is now owed to the son, and neither father nor son can sue for possession of the mortgaged property. The son has now acquired a right of action and cannot claim any right over the property mortgaged from the preceding period. The same is said of a surety.

29 PAUL, *Replies, book 5:* Paul replied that a general agreement sufficed to create a mortgage, but that the testator's creditor could not claim what was not an asset of the deceased but was acquired by his heir separately. 1. If slaves are subject to a mortgage, so are their offspring. When we say that the offspring are mortgaged, whether especially mentioned or not, we mean if they are owned by the mortgagor or his heir. If the slaves gave birth under a different owner, the offspring are not mortgaged. 2. A mortgaged house is burned down. Lucius Titius bought the site and built on it. A question was put about the mortgage. Paul replied that the action for mortgage continued, and the building, which went with the soil, was therefore mortgaged. But a possessor in good faith cannot be forced to give the creditor possession of the building unless he receives his building expenses so far as they enhance the value of the land. 3. If with his owner's knowledge and consent a slave agrees that all his owner's goods shall be mortgaged, the slave who so agrees is also mortgaged.

30 PAUL, *Replies, book 6:* If a debt is sold, the risk on the buyer includes the mortgaged property, if it is shown that the property was mortgaged for the debt.

31 SCAEVOLA, *Replies, book 1:* By a clause of a long lease of public land, if the ground rent was not paid for a certain period, the land reverted to the owner. Later the land was mortgaged by the possessor. Is the mortgage valid? Scaevola replied that if money was paid, there was a mortgage. 1. Again, if both debtor and creditor fail to pay the ground rent and the land is therefore declared the owner's in accordance with the clause, who prevails? He replied that if on the facts the owner on nonpayment of the ground rent exercised his rights, the mortgage ended.

32 SCAEVOLA, *Replies, book 5:* A debtor agreed that whatever was brought on the mortgaged land or there arose or was produced should be subject to mortgage. Part of the land was untenanted, and the debtor handed it to his managing slave to farm, assigning him the slaves needed for the purpose. The question was whether the managing slave, the other slaves sent to farm, and the manager's *vicarii* were subject to the mortgage. Scaevola replied that only those who were brought on by their owner as permanent, not those lent temporarily, were mortgaged.

33 TRYPHONINUS, *Disputations, book 8:* One who made a promise to you or Titius cannot recover a payment made to Titius, but can recover a thing pledged to him even before payment.

34 SCAEVOLA, *Digest, book 27:* When a debtor mortgaged a stall to the creditor, the question was put whether this was invalid or whether by "stall" the merchandise in the stall was to be taken as mortgaged. And if he sold goods from time to time, bought others, brought them into the stall, and then died, could the creditor in the action on mortgage sue for all that was then on the premises, in view of the turnover of stock? Scaevola replied: What was in the stall at the debtor's death was subject to the mortgage. 1. The following letter was sent: "I have borrowed fifty from you and asked you to accept a mortgage instead of a surety. You well know that my shop and slaves are bound to no one but you, and you have trusted me as the honest man I am." Is there a mortgage, or is the letter, which is undated, ineffective? Scaevola replied: Since there was agreement on the property mortgaged, the mortgage was not invalid merely because it was not dated or sealed. 2. A creditor took from a debtor a mort-

gage of his present and future assets. The question was whether the actual coins borrowed by the debtor from another, when part of his estate, were mortgaged to the creditor. Scaevola replied that they were.

35 LABEO, *Plausible Views, Epitomized by Paul, book 1:* If a block which by agreement you had the right to sell is burned down and rebuilt by the debtor at his own expense, you have the same right in the new block.

2

IMPLIED *PIGNUS* OR *HYPOTHECA*

1 PAPINIAN, *Replies, book 10:* By a resolution of the senate in the time of the Emperor Marcus, the mortgage of a block to a creditor, who made a loan for a building to be put up on the site and conveyed to him, enures in favor of the person who, at the then owner's bidding, provided the ultimate owner with the money to lend.

2 MARCIAN, *Action on Mortgage, sole book:* In the fortieth book of his *Readings*, Pomponius writes: Property brought on to an urban tenancy is hypothecated not only for the rent, but for any deterioration of the premises due to the tenant's fault, such as gives rise to an action on the lease.

3 ULPIAN, *Edict, book 73:* If a warehouse, hotel, or site is leased, Neratius thinks that there is here also an implied agreement for the hypothecation of goods brought in. This is the better view.

4 NERATIUS, *Notes, book 1:* We accept that property brought on to an urban leasehold is hypothecated, as if this had been impliedly agreed. The opposite is true of rural tenancies. 1. The position of stables which are not directly adjacent to urban land is doubtful. Since they are separate, they are certainly not urban property; but so far as the implied hypothecation is concerned, they hardly differ from it.

5 MARCIAN, *Action on Mortgage, sole book:* In the thirteenth book of his *Readings*, Pomponius writes: If a tenant lets me live on the premises rent free, what I bring in is not hypothecated to the owner of the block. 1. Again, he says, we must see whether, if the owner so intends, property can be brought in so as to be hypothecated for part of the debt. 2. If someone goes surety when his property has been mortgaged by the debtor for whom he goes surety, the net result follows that by the mere fact of going surety, he is taken to authorize the mortgage of his property. If, however, his property is given in mortgage after he has gone surety, it will not be validly bound.

6 ULPIAN, *Edict, book 73:* Although it is understood that in urban tenancies property brought on the premises is impliedly hypothecated as if this had been specifically agreed, yet a hypothec of this sort is no bar to the grant of liberty. Pomponius agrees. He says that security for rented accommodation is no bar to freeing a slave.

7 POMPONIUS, *Readings, book 13:* As regards rural land the crops are impliedly taken to be hypothecated to the owner of the land, even if not agreed in so many words. 1. We must see whether everything brought on to premises is hypothecated or only what is brought on so as to remain there. The latter is the better view.

8 PAUL, *Views, book 2:* Where the debtor has the use of money free, the creditor can keep interest up to the statutory amount from the fruits of the property mortgaged to him.

9 PAUL, *Duties of Prefect of the Watch, sole book:* There is a difference between property hypothecated for rent and property secured by an express agreement. We cannot free slaves subject to an express mortgage, but we can free slaves living on rented premises, until we are foreclosed for the rent. After that we cannot effectively free slaves detained by way of security. The jurist Nerva was mocked for holding that we can free slaves detained for rent by pointing at them through the window.

10 SCAEVOLA, *Digest, book 6:* The heir of a guardian made a compromise with the heir of his ward, paid most of it, and mortgaged property for the rest. The question asked was whether the property was bound for what was due under the old contract. Scaevola answered that on the facts stated it was.

3

PROPERTY WHICH CANNOT BE SUBJECT TO *PIGNUS* OR *HYPOTHECA*

1 MARCIAN, *Action on Mortgage, sole book:* A *pupillus* cannot mortgage property without his guardian's authority. 1. If a son-in-power or slave mortgages property belonging to his *peculium*, the property is not validly bound even if he has the free management of his *peculium*. In the same way, *pupilli* and slaves cannot make gifts, since their "free management" is not unlimited. It is a question of fact what the limits of the freedom given to them are. 2. As the deified Pius said in a rescript to Claudius Saturninus, one cannot take a mortgage over property which cannot be bought, because it is outside the private sphere. Well, then, if someone takes a mortgage over property which is the subject of a lawsuit, has the mortgagor the defense? Octavenus put the view that the defense applied to mortgage also. Scaevola, in the third book of his *Questions*, says that this applies to movables.

2 GAIUS, *Action on Mortgage, sole book:* If someone gives a mortgage for a woman who has taken another's debt on herself or for a son-in-power who has borrowed contrary to the *senatus consultum* [*Macedonianum*], does the law come to his aid? The person who mortgages his property for a woman can easily obtain relief, just as one who goes surety for a woman gets the same defense as she does. In the same way, the law as to a surety for a son-in-power applies to a mortgagor on his behalf.

3 PAUL, *Questions, book 3:* Writing to Neratius Priscus, Aristo said: Although it is a term of the contract that the first mortgagee drops out, the second does not succeed to his mortgage unless it is agreed that the same property is mortgaged to him also. A person who has not agreed on a mortgage cannot succeed to the first mortgagee; and in that case, the purchaser of the property prevails. Further, if the first creditor made an agreement with the debtor that the mortgaged property might be sold, and the second did not (not because he forgot but because it was intended that he could not sell), we must see whether the right of the first passes to him, so that he can sell.

I think he can. It often happens that a person can acquire via a stranger something which he does not have in right of his own person.

4 PAUL, *Replies, book 5:* As Titius wanted to borrow money from Maevius, he promised to repay Maevius the amount, listing certain assets to be mortgaged. He sold some of the listed property and then received the loan. The question was whether the property sold before the loan was also bound to the creditor. Paul answered that since, even after he had promised to pay Maevius, the debtor was free not to take the loan, the mortgage must be taken as entered into at the time when the loan was made. Hence, one must inquire what property was part of the debtor's estate at that moment.

5 PAUL, *Views, book 5:* If a creditor knowingly takes from a father his son-in-power by way of mortgage, he is relegated.

4

PRIORITY IN *PIGNUS* OR *HYPOTHECA* AND DISPLACING AN EARLIER CREDITOR

1 PAPINIAN, *Questions, book 8:* A person who promised a dowry for a woman took a *pignus* or *hypotheca* for the return of the dowry to himself [on dissolution of the marriage]. Part of the dowry was paid over and the husband mortgaged it to another. Then the rest was paid over. A question was put about the mortgage. Since the promise bound the promissor of the dowry to pay over the whole, the dates of payment may be disregarded in favor of the date of the promise to pay. It would be improper to say that the promisor had the power to pay less, so that the woman had less dowry. 1. It is different if someone takes a mortgage for the amount to be lent by a certain date, and, before he lends the money, the asset is mortgaged to another.

2 PAPINIAN, *Replies, book 3:* A person who takes a general mortgage over a debtor's estate is preferred to a later mortgagee of specified land in his estate, even if he can recover the debt from other assets. But if the agreement with the first creditor was that the remaining assets were mortgaged only if the money could not be recovered from assets [not] generally mortgaged, on default under the second agreement the second creditor is the sole rather than the prior mortgagee.

3 PAPINIAN, *Replies, book 11:* A creditor took a mortgage of assets over which a second creditor also took a mortgage, then by novation added further assets to his security. It was held that the first creditor kept his priority in time as if succeeding to himself. 1. When Titius was entitled to land under a mandate executed on his behalf, he mortgaged it before obtaining possession. After taking possession, he mortgaged it again to another. The first creditor clearly had priority, unless the second advanced the purchase price to the agent in which case the second is preferred as regards the price paid and interest, unless it happens that the first offers to repay him. If the

debtor paid the price from another source, the first creditor has priority. 2. Brothers made a division of land into separate areas and agreed that if one failed to pay off his creditor, the mortgagee of an undivided portion of the land, the other might sell half the area allotted to the first. I thought that a mortgage was created, but that the first creditor did not have priority over the second, since the second mortgage pertained to that part which one brother could not bind in excess of his own share without the consent of the other.

4 POMPONIUS, *Sabinus, book 35:* If the debtor, before redeeming the property mortgaged from the earlier creditor, mortgaged the same property to another for a loan and, before paying both creditors, sold something else to the first creditor and set his loan off against the price, the position must be taken to be the same as if the first creditor had been paid. It makes no difference whether the debtor paid or made a set-off, and so the later creditor prevails.

5 ULPIAN, *Disputations, book 3:* Sometimes the later creditor prevails over the earlier, for instance, if the loan by the later was spent on preserving the mortgaged property. For example, a ship is mortgaged and I lend money to fit it out and repair it.

6 ULPIAN, *Edict, book 73:* Since the money preserved the object of the mortgage. Even if the loan was for provisions for the sailors, this view can be accepted, since without food the ship could not arrive safely. 1. So if someone lends money so that cargo secured in his favor may be saved or that freight may be paid on it, he will prevail, though his mortgage is later. Indeed, the freight itself has priority. 2. The same is held if the rent of a warehouse or site or freight for animal transport is owed. This too has priority.

7 ULPIAN, *Disputations, book 3:* The position is the same if something is bought with money of a *pupillus*. If then something is bought with the money of two *pupilli*, they have a concurrent mortgage proportionate to their contribution to the price. If, again, less than the whole price is paid with someone's money, both creditors will have concurrent claims, the first mortgagee and the person whose money was used to pay. 1. I mortgage in your favor my future assets and also specially mortgage certain land, should it become mine, in favor of Titius. I then acquire the land. Marcellus thinks that both creditors have concurrent mortgages. It makes little difference that the debtor paid with his own money, since property purchased with money subject to a mortgage is not for that reason alone subject to the mortgage.

8 ULPIAN, *Disputations, book 7:* If a *res publica* takes a special mortgage, we should hold that it has priority over the imperial treasury, if the debtor's liability to the imperial treasury was incurred later, since private persons are also preferred in this case.

9 AFRICANUS, *Questions, book 8:* A man who rented baths from the first of the following month agreed that a slave Eros should be mortgaged to the lessor until the rent was paid. Before the first of July he mortgaged Eros to another creditor for a loan. Asked whether the praetor should protect the landlord against the latter creditor in a suit for Eros, he answered that he should. Although, when Eros was mortgaged, nothing was yet owing for rent, even then the position of Eros was that he could not be released from mortgage without the landlord's consent. So the landlord should have priority. 1. He also took the view that a conditional creditor should be protected

against one to whom a debt was later incurred, unless the condition was one which could only be fulfilled with the debtor's consent. 2. An heir mortgaged his property, which included assets conditionally bequeathed as a legacy, and later mortgaged the same assets for a loan. The condition of the legacy was fulfilled. Here, too, he thought that the earlier mortgagee should be protected. 3. Titia mortgaged land which was not hers to Titius, then to Maevius. Later she became owner and gave the land to her husband as a dowry at valuation. Julian took the view that payment to Titius would not improve the position of Maevius's mortgage. The extinction of a prior mortgage confirms a later only when the assets are in the debtor's estate. In the case put, the husband is like a purchaser. Hence, as the assets were not part of the woman's estate when she gave Maevius a mortgage nor when she paid Titius, there was no intermediate point of time at which the mortgage to Maevius could become effective. This is the case only if the husband accepted the dowry at valuation in good faith, not knowing it was mortgaged to Maevius.

10 ULPIAN, *Replies, book 1:* If there is a valid judgment and a pledge is taken in execution of the judgment on proper authority, it is laid down that by priority in time the heir of the pledge creditor will be preferred.

11 GAIUS, *Action on Mortgage, sole book:* The mortgagee who first lent money and took a mortgage is preferred, although the debtor had previously agreed to mortgage the property to another if he gave him a loan (even if the loan was later made). Though he agreed to the mortgage first, he might not in fact take the loan. 1. Should we say the same if a mortgage is given to secure a conditional stipulation, and while the condition is undetermined, a second creditor makes an unconditional loan on the same security? If the condition is then fulfilled, is the second creditor preferred? I fear not. When the condition is fulfilled, the original promise is treated as if it had been made unconditionally. This is the better solution. 2. If the tenant of a farm agrees that things brought on the farm or there arising are hypothecated and before he brings something on, he mortgages it to another (and later brings it on), the special mortgagee will be preferred. As regards the landlord, it was not the agreement that created the mortgage, but the later bringing on. 3. If there is agreement to mortgage future assets, such as a slave's offspring, we must inquire whether the slave mother formed part of the debtor's estate at the time of the agreement. If fruits are mortgaged, again, was the farm or the usufruct the debtor's at the time of agreement? 4. If the later creditor is willing to pay the earlier his debt, we must ask whether, supposing the earlier refuses to accept payment, the later can bring the action on mortgage. We are clear that the earlier cannot bring the action, since the nonpayment is his fault.

12 MARCIAN, *Action on Mortgage, sole book:* If an earlier creditor takes a mortgage or takes possession, and another sues by the action on mortgage, the earlier has the valid defense "unless the property was bound to me by *pignus* or *hypotheca* before." If, again, another has possession and the prior creditor sues in the action on mortgage and the defense is "unless it was agreed that I should have a mortgage," the plaintiff can reply as stated above. Even if a second mortgagee sues a possessor, he can succeed in having the property assigned to him, but the first can in turn sue him and take it from him. 1. If there is judgment against the possessor as above and, instead of delivering the mortgaged property, he pays its value as assessed by the judge, is he liable to the second, as he would be if the first creditor had been paid? I think that this result should be accepted. 2. If the first lends without a mortgage and second lends

with one, then the first takes a mortgage, the second undoubtedly prevails. If someone agrees on a mortgage at a future date, he undoubtedly prevails though before that date an immediate mortgage is agreed with another creditor. 3. If the first lends money both before and after the second, he prevails over the second in respect of the former loan but comes third in respect of the latter. 4. If the debtor agrees a mortgage with you and then makes a second mortgage at your bidding, the second prevails. Whether, if the second is paid, your mortgage revives is debated. It is a question of fact. Was the understanding that the first creditor in agreeing to the second mortgage wholly abandoned his own, or merely changed the priorities and accepted second place? 5. Papinian, in his eleventh book, gave the opinion that if the first creditor makes a novation and takes a mortgage of the same property along with another, he succeeds to himself. But if the second does not offer to pay off the first, the first can sell the property and keep the amount of the first, not the second loan, and pay the second any surplus over the amount of the first loan. 6. The property is mortgaged to the second creditor, even if the debtor does not agree, both for his own debt and interest and for debt and interest paid to the first creditor. He will not, however, obtain interest on interest paid to the first creditor, because he paid it to benefit himself, not another. Papinian, in the third book of his *Replies*, so holds, correctly. 7. If the second creditor took an unconditional mortgage, he can take the property from any possessor except the first creditor or a purchaser from him. 8. A man borrowed from Titius and agreed that his land should be mortgaged to him. Then, he borrowed from Maevius and agreed that if the mortgage of Titius was discharged, the land would be mortgaged to Maevius. Then, a third man lends you money to pay Titius, and agrees with you that the same land should be bound to him by way of *pignus* or *hypotheca* and that he should take the place of Titius. Can the intermediate man, who made his mortgage conditional on Titius being paid, have priority over the third, and the third be left to regret his carelessness? Even here the third creditor must be preferred to the second. 9. If the third creditor allows the assets mortgaged to him to be sold, so that payment can be made to the first and the third can succeed to a different mortgage in favor of the first, Papinian, in the eleventh book of his *Replies*, says that he will succeed. The only right of the second creditor is to take the place of the first if he pays him. 10. If the property is bound by *hypotheca* to a first creditor with no agreement as to sale, and there is an agreement for sale with a later creditor, the first is indeed preferred. For even in the case of *pignus*, if the first has agreed on the *pignus* but the property is delivered to the second, the first has priority.

13 PAUL, *Plautius, book 5:* I sold you an apartment block on terms that the first year's rent accrued to me, the second to you, and that we should both have the benefit of securities given by the tenants. Nerva and Proculus hold that unless the securities are sufficient for the rents of both years, the whole goes to me, because there was no express agreement that the amounts should be secured proportionately on all the property secured. If anything is left over, it goes to you. PAUL: It is a question of fact, but probably the intention was that the rents should be secured in the order in which they fell due.

14 PAUL, *Plautius, book 14:* If a nonowner mortgages the same thing at different times to two persons, the earlier prevails, although, if we take a mortgage from different nonowners, the party in possession has the advantage.

15 PAUL, *Edict, book 68:* A surface right on another's land can be mortgaged, although the landowner has priority if the ground rent is not paid.

16 PAUL, *Questions, book 3:* Claudius Felix mortgaged his farm to three people, first Eutychiana, then Turbo, then another creditor. Euthychiana, making no proof of her claim, lost in a suit by the third creditor and did not appeal. Turbo lost in a suit before another judge and appealed. It was asked whether the third creditor who had won against the first should prevail over Turbo or whether, in the absence of the first, Turbo excluded the third. Of course, when the third pays the first, he takes the place of the first as regards the amount paid. So some argued that here too the third should prevail. I regarded this as highly unjust. Suppose the first creditor to have sued the third and lost, owing to a defense or for some other reason. Could the third creditor, having defeated the first, rely on *res judicata* against the second, Turbo? Again, if after the first suit in which the first lost to the third, the second won against the third, could the second rely on *res judicata* against the first? In no way, I think. So the third creditor did not, by shutting her out, succeed to the first, nor does judgment between parties run against or in favor of a nonparty. The first judgment does not conclude the matter, but leaves the whole right of the other creditor intact.

17 PAUL, *Replies, book 6:* A purchaser of mortgaged land from a debtor is protected to the extent to which the purchase price has reached the earlier creditor.

18 SCAEVOLA, *Replies, book 1:* Lucius Titius lent money at interest and took a mortgage. Maevius lent money to the same debtor and took a mortgage of the same property. My question is whether Titius is preferred only as regards the capital and interest due up to the date of the loan to Maevius or also as regards later interest. Scaevola answered: Lucius Titius is preferred as regards everything due to him.

19 SCAEVOLA, *Replies, book 5:* A woman gave mortgaged land to her husband as dowry and by will instituted her husband and her children born to him and to another as heirs. Though the creditor could have sued the solvent heirs, he went against the land. The question put is whether, if a lawful possessor offers him what is owing, he is compelled to assign the debt. I answered that the possessor's demand is not unjust.

20 TRYPHONINUS, *Disputations, book 8:* You made a first contract with the debtor, then, before you made a second loan, Seius lent him fifty and the debtor mortgaged to Seius the surplus proceeds of the property mortgaged to you. Then, you lent the same debtor, say, forty. The question put was whether the surplus realized by the mortgaged property over the first loan went to Seius for fifty or to you for forty. Suppose that Seius was willing to offer you the amount first lent? I said that it followed that Seius was preferred as regards the surplus, and, if he offered the amount of the first loan and interest, the first creditor was postponed to him as regards the later loan to the same debtor.

21 SCAEVOLA, *Digest, book 7:* Titius mortgaged to Seia, for the amount for which he had been held liable to her as her tutor, all his present and future goods. Then he

borrowed money from the imperial treasury and mortgaged his whole estate to it. He paid Seia part of the debt and by novation made a promise to her of the rest in which a mortgage to her similar to that above was included. The question put is whether Seia is preferred to the treasury even as regards those assets which Titius had at the time of the earlier obligation, and also as regards later acquisitions, until she is paid her debt in full. Scaevola answered that there was nothing in the facts put to prevent her being preferred. 1. A loan was made to a marble dealer subject to a pledge of the marble slabs, the sellers of which had been paid with the creditor's money. The debtor was also lessee of an imperial warehouse, rent for which had not been paid for a number of years. The imperial procurator claimed to sell the slabs in pursuance of his duty to exact payment. The question put was whether the creditor could retain them by way of pledge. Scaevola replied that according to the facts stated he could.

5

SALE OF PROPERTY SUBJECT TO *PIGNUS* OR *HYPOTHECA*

1 PAPINIAN, *Questions, book 26:* A creditor took land on mortgage and, after another creditor had made an agreement for the mortgage of the debtor's goods, himself made a similar agreement as regards the goods, for the original or another debt. Before the second creditor was paid and without right, he then sold the goods as being mortgaged to him. The second creditor has no personal action against the first for his security on that account, nor should an *actio utilis* be given. Since the first pursued his own interest under a mistake as to priority, he cannot be sued for theft of movables; anyhow the second creditor did not lose possession by the theft, since he did not have it. Nor is the first liable in an action for production, since he neither possesses the goods nor lost them dishonestly. In the upshot, the second creditor must claim against those who now possess the goods.

2 PAPINIAN, *Replies, book 2:* A surety who was sued secured from the judge that he should take over the land mortgaged to the creditor by way of purchase. Nevertheless, another creditor who made a later contract on the same security will be able to buy him out by offering what the surety paid together with interest for the intervening period. A sale of this sort has by operation of law the effect of transferring the mortgage.

3 PAPINIAN, *Replies, book 3:* When the first creditor has sold the property mortgaged in terms of the agreement, it is agreed that the second no longer has the right of buying out the first. 1. If, however, the debtor without objection from the creditor sells the property mortgaged and pays the price to the first creditor, it is possible to offer the buyer the money which went from him to the first creditor, together with interest for the intervening period. For it makes no difference whether the debtor sold the property mortgaged or mortgaged it a second time.

4 PAPINIAN, *Replies, book 11:* When there is an agreement for payment on a certain day, it is taken as agreed that the power to sell the property mortgaged will not be exercised before that day.

5 MARCIAN, *Action on Mortgage, sole book:* When a second creditor has offered payment to the first and taken his place, he may rightly sell the property in virtue of the payment and loan. 1. If the second creditor or surety pays the money and takes over the property mortgaged, an offer of payment may properly be made to them, although they hold the property by way of purchase.

6 MODESTINUS, *Rules, book 8:* When a later creditor purchases the mortgage from an earlier, he is taken to have done so not to acquire the ownership but to preserve his

own mortgage. Hence, the debtor may make him an offer of payment.

7 MARCIAN, *Action on Mortgage, sole book:* If the creditor sells property subject to *pignus* or *hypotheca* on terms that he may repay the price and take it back, can the debtor achieve the same result if he is willing to repay the price? In the eleventh book of his *Digest*, Julian writes that the property subject to *pignus* was validly sold, but that suit lies against the creditor to cede any actions he has to the debtor. What Julian says of *pignus* applies to *hypotheca.* 1. We must inquire whether, if property mortgaged is sold, the debtor may repay the money and recover it. If it was sold on terms that the sale would be rescinded if the debtor paid the money within a certain period, he can recover the property if he pays within that period. If the period has passed or if there was no such term, the sale cannot be rescinded unless the debtor was under twenty-five, a *pupillus*, or absent on public business, or belonged to some other class to which the edict gives relief. 2. If the creditor makes it a term that the debtor may not sell the property subject to *pignus* or *hypotheca*, what is the legal position? Is the agreement void as contrary to law, so that the property can be sold? Such a sale is certainly void, so that the agreement holds good.

8 MODESTINUS, *Rules, book 4:* The creditor has a choice, at his own convenience, which of the properties mortgaged to him he will sell.

9 PAUL, *Questions, book 3:* The question was put whether, if the creditor could not realize the debt from the sale of the property mortgaged, the debtor was released. I thought that if there was no fault on the creditor's part, the debtor remained bound, since if a sale is necessary it does not free the debtor unless the proceeds cover the debt. 1. Moreover, Pomponius, in the second book of his *Readings*, writes: The usual clause in mortgages, that the debtor will pay the shortfall after the sale of the property mortgaged, is superfluous, since that is the law even without the clause.

10 PAUL, *Replies, book 6:* Although a buyer of mortgaged property in terms of the mortgage cannot sue the vendor for eviction, the creditor who sells land is out of court if he tries to disturb the buyer's title on some other ground.

11 SCAEVOLA, *Replies, book 1:* The arbitrator dividing an inheritance divided the corporeal property and assigned the debts due from certain joint debtors to each heir in full. The question raised was whether each heir could sell the whole property mortgaged if the debtors failed. I replied that they could.

12 TRYPHONINUS, *Disputations, book 8:* When Papinian headed the Office of Petitions, the emperor gave a rescript to the effect that the creditor could buy the property mortgaged from the debtor, since the debtor remained owner. 1. If property not belonging to the debtor is mortgaged and sold by the creditor, do the proceeds received free the debtor from a personal action on the loan? This opinion would be correct if by the terms of the sale the creditor was not liable for eviction, because the receipt of the price was occasioned by the contract with the debtor, no matter what the security given. Hence, it should, in fairness, benefit the debtor rather than the creditor. But though the debtor is freed from the creditor, he is liable in a *utilis actio* to the owner, if eviction has not yet taken place, or to the buyer, after eviction, so that he may not profit from another's loss. Moreover, if the creditor takes the property from a possessor in an action for the fruits in excess, he must set the whole of them against the amount due. And where, owing to a wrong decision by the judge, the creditor

removed property not belonging to the debtor from its true owner, as if mortgaged to him, and the question was raised whether the property should be returned to the debtor if he paid, our master Scaevola held that it should.

But if the creditor sells not on terms that he is to keep the price in any event but that he may have to return it, he can, I think, claim nothing from the debtor in the meantime; whether the latter is discharged remains in suspense. If, however, the creditor is sued by the buyer and pays, he can recover from the debtor, because it is now clear that the debtor was not discharged.

13 PAUL, *Decrees, book 1:* A creditor who by virtue of his rights sells the property mortgaged must cede his rights and, in any event, if he possesses the property, give possession to the buyer.

14 SCAEVOLA, *Digest, book 6:* An arbitrator dividing an inheritance divided the corporeal property and assigned the debts due from certain joint debtors separately to different heirs in full. The question raised was whether each of them could sell the property mortgaged on that account in full if the debtor assigned to him failed. Scaevola replied that he could.

6

ENDING A *PIGNUS* OR *HYPOTHECA*

1 PAPINIAN, *Replies, book 11:* The friend of an absent debtor acted for him and discharged mortgaged property with his own money so as to avoid a sale. The owner recovers his former ownership, and the friend cannot properly claim for himself an equitable Servian action. If, however, he is in possession, he can rely on the defense of fraud. 1. A vendor received part of the price and took a mortgage over the land sold, then made a gift of the remainder to the buyer by letter. On his death, it was settled that the gift was for certain reasons invalid. Clearly, the imperial treasury, which had succeeded to the vendor, could not sue for the land as mortgagee, since the initial intention to make a gift discharged the mortgage. The gift was invalidated by statute, which plays no part in discharging a mortgage. 2. The defender of an absentee gave security that judgment would be paid. If the absentee later takes over the case, the sureties and real securities given by the defender for satisfying the judgment are discharged.

2 GAIUS, *Provincial Edict, book 9:* The creditor sued the possessor by the Servian action, and the possessor paid the value assessed by the judge. If the debtor then brings the *vindicatio* against the possessor, he cannot succeed unless he first offers him the amount of the debt.

3 ULPIAN, *Disputations, book 8:* If a thing is sold and delivered subject to a better offer being made by a certain date, and, before a better offer is made, the buyer mortgages the thing, Marcellus, in the fifth book of his *Digest*, says that the mortgage is discharged if a better offer is made, although, if the sale were subject to the buyer's power to reject, he does not think the mortgage is discharged.

4 ULPIAN, *Edict, book 73:* If a debtor whose assets were mortgaged lawfully returns a slave he has bought, can the Servian action be brought? It probably can, unless the creditor agreed to the return. 1. If the creditor agrees to the debtor selling, exchanging, giving, or making a dowry of the security, the mortgage will be discharged, unless he agreed to the sale, and so forth without prejudice to his mortgage, a common form of agreement. If the creditor sells the security himself on terms that the mort-

gage remains unless he is paid, there will be no defense to his action. Even if he did not authorize, but ratified the sale, the position will be the same. 2. If the sale of especially mortgaged property is invalid, it is a neat point whether this affects the creditor who has consented to it, for example, if there is a legal obstacle to the sale. The mortgage remains valid.

5 MARCIAN, *Action on Mortgage, sole book:* A mortgage is discharged if so agreed or if the creditor agrees not to sue for the money, unless the agreement is put forward as merely one not to sue the debtor in person. And what if a third person later possesses the security? Since an informal pact gives a permanent defense, here too one can say that the mortgage is discharged. 1. If the creditor agrees not to sue for the debt for a year, he is taken to make the same agreement about the mortgage. 2. If it is agreed that a surety should be given in place of the mortgage, and a surety is given, this amounts to satisfaction, and the mortgage is discharged. It is different if the creditor sells the debt and receives money for it. Then all the obligations remain intact, since he took the money by way of price, not payment. 3. The creditor is regarded as satisfied if an oath is offered and taken to the effect that the asset is not mortgaged.

6 ULPIAN, *Edict, book 73:* A mortgage is also discharged if the debt is paid or satisfied. The same must be said if a time limit on the mortgage has been reached, or if for some reason it has ceased to be binding. 1. A person who is ready to pay is rightly taken to discharge the mortgage. But one who is ready to make satisfaction is in a different position. Actual satisfaction benefits the debtor, since a creditor who accepts satisfaction instead of payment has himself to blame. But a creditor who does not accept satisfaction but instead demands payment is in no way at fault. 2. Moreover, we do not follow the opinion of Atilicinus who argued that if satisfaction for a certain amount is given, the creditor must give up his mortgage.

7 GAIUS, *Action on Mortgage, sole book:* If the creditor agrees to a sale, the mortgage is discharged. The consent of a *pupillus* is, however, only confirmed if, when he agreed, his tutor was present and authorized his act, or the tutor himself agreed. This is so if the judge thinks that the agreement brings some benefit or satisfaction to the *pupillus*. 1. We must see whether the consent of a general procurator or a slave who is appointed agent to receive payments is effective. It is not held effective unless they have a specific authority to consent. 2. The debtor can take advantage of an agreement with his procurator that the mortgage be discharged by raising the defense of fraud. If the agreement is with his slave, he can rely on the defense of pact itself. 3. If it is agreed that an undivided share of a defined thing be alienated, the mortgage can be enforced as regards the remaining share, and the defense is no bar. 4. It is held that if someone mortgages an undivided share of common property and the property is divided among the co-owners, the mortgage extends not to the separate share of the mortgagor but to an undivided half share of the whole.

8 MARCIAN, *Action on Mortgage, sole book:* If a thing perishes, or a usufruct is destroyed, the *pignus* or *hypotheca* is extinguished. 1. A creditor can agree that a thing shall no longer be subject to *pignus* or *hypotheca*. Hence, if he so agrees with the debtor's heir, the beneficiary to whom the estate is transferred under the *senatus consultum Trebellianum* can rely on the agreement. 2. If the case is brought

against an assignee of the debtor, I think there is no doubt that the creditor is bound. If there is an assignee of the creditor and he agrees, he cannot succeed in the action on mortgage. Indeed, I think that in this case the assignors are bound by the defense of pact. 3. If it is agreed that an undivided half shall not be mortgaged, whatever share may be claimed from any possessor, that half cannot properly be claimed. 4. Several mortgage an undivided asset, and the creditor agrees with one to release the mortgage, then sues him. Although the one debtor possesses the whole land, he does not bar the creditor from the whole, since he agreed as to part. 5. Can a son-in-power or slave agree to release something mortgaged to them in connection with their *peculium* of which they have the free administration? They cannot make gifts, so can they release a mortgage? We must agree that they can, provided that, as it were, they sell their agreement and get a price in return. 6. If land is alienated at the creditor's behest, it is shameless for him to claim to be paid the proceeds, if there has been an actual sale. If there has not, the mere willingness of the creditor does not bar him. 7. If the debtor is in possession, it is pointless to raise the defense that the land mortgaged was sold with the consent of the creditor, unless, as can happen, the debtor sold with his permission and later redeemed the land in good faith from the buyer or another who had succeeded to it, or the debtor himself became heir to the buyer. But as the debt was not paid, the suspicion of fraud carries forward to the present, and so the creditor can raise the reply of fraud. 8. Titius, a debtor, at the behest of his creditor sells the property to Maevius or to someone from whom Maevius buys, and later Maevius becomes heir to Titius. If the creditor sues Maevius, what is the law? It is unjust for the creditor to take from him what he acquired not by succession but in another way. But one can say that since it was the dishonesty of Titius that prevented the creditor getting money from the person in possession, it is very unfair that the creditor should be fooled. 9. If, again, the land is mortgaged by Maevius to someone who has not been satisfied and takes possession, then it will be fair to raise the defense "unless it was sold at the creditor's behest." Although the debtor was dishonest in not paying, the second creditor who took a mortgage prevails. 10. However, it is safer, if the debtor asks the creditor to allow him to sell the security in order to pay, to take a deed from the buyer to pay the purchase price to the creditor up to the amount of the debt. 11. "Sale" must be taken broadly. Hence, permission to bequeath as a legacy is also effective. But if the legacy is rejected, the mortgage revives. 12. If the debtor has sold but not delivered the property mortgaged, can the creditor sue, since it forms part of the debtor's estate, or is the mortgage ended? Since the debtor is bound by the sale, probably the latter. Suppose that the seller does not get the price, or the buyer refuses to pay? The same answer can be given. 13. If the creditor agreed to a sale and the debtor made a gift, is there a defense against the creditor? Or is it a question of fact whether he consented to the sale in order to benefit from the price paid? In that case, his agreement does not bar him. But if the debtor gave the property as dowry, he is, in view of the burdens of marriage, rightly taken in this case to have sold. Conversely, if the creditor agreed to a gift and the debtor sold, he is barred, unless one says that he agreed to the gift because he was a friend of the donee. 14. If the creditor consented to a sale at ten and the debtor sold at five, the creditor should not be held barred. Conversely, if he sold at more than the creditor agreed, there is no question that the sale was proper. 15. The creditor is not taken to consent if the debtor

sold the security with his knowledge, and he allowed the sale because he knew the mortgage would continue in his favor. If, however, he subscribed the deed of sale, he is taken to consent, unless clearly deceived. The same is true if he agreed, but not in writing. 16. If there was consent to sale by the debtor and his heir sold, there may be a question of fact what the creditor intended. But the sale must be held a proper one, since judges do not allow these fine distinctions. 17. If there is consent to sale and the debtor ceases to possess and another possesses and sells, does the mortgage continue on the ground that the creditor's permission was personal? It probably does. But if the creditor allowed the new possessor, not the mortgagor, to sell, the defense can be raised against him. 18. If the creditor consents to sale within one or two years, a later sale does not destroy the creditor's mortgage. 19. The creditor brings the action on mortgage and gets the assessed value of the security from the possessor. If he then sues the debtor for the debt, I think he will be met by the defense of fraud.

9 MODESTINUS, *Replies, book 4:* Titius mortgaged land to Sempronius and mortgaged the same land later to Gaius Seius; he then sold to Sempronius and Gaius Seius jointly the whole land previously mortgaged to them separately. My question is whether the sale extinguishes the mortgage and leaves both merely with rights of purchase. Modestinus replied that the persons in question were owners by purchase, as they had agreed to the joint purchase, and had no action on the mortgage. 1. Titius lent money to Seius subject to a mortgage of land. As this land had previously been mortgaged to a *res publica*, the second creditor paid the *res publica* its debt. Then, Maevius intervened to claim that the land was mortgaged to him before the mortgage to the *res publica.* It was found that Maevius had been present and witnessed the deed between Seius and the *res publica* in which Seius recorded that the land was not mortgaged to anyone else. Can Maevius have any action *in rem*? Modestinus replied that he could certainly not retain the mortgage in view of his consent.

10 PAUL, *Questions, book 3:* With the creditor's consent, the debtor sold the security and later agreed with the buyer to resile from the sale. The creditor's mortgage will be preserved. Both creditor and debtor are restored to their former position, and the creditor agreed to remit the mortgage only if the buyer retained the thing sold and did not return it to the seller. So if in an action the seller is held not liable, or is held liable for damages for nondelivery, which could have happened even if the creditor had not consented to the sale, the creditor will keep his mortgage. 1. If the creditor sells the security and the sale is canceled or the slave lawfully returned, the ownership reverts to the debtor. The same is true of anyone authorized to sell another's property. He does not, merely because he transfers ownership, get it back from the buyer. On rescission of the sale, the original position is restored.

11 PAUL, *Replies, book 4:* Lucius Titius was indebted to his wife Caia Seia to whom he had given a *pignus* or *hypotheca* of lands. Together with his wife Seia he gave Sempronius, the future husband of their daughter Seia Septicia, the same lands as a dowry. 1. On the death of Lucius Titius, Septicia declined to accept her father's inheritance. My question is whether her mother can sue for the mortgaged land. Paul replied that Gaia Seia must be taken to have released the mortgage on the lands when she concurred with her husband in providing a dowry for their daughter, which was

given in the daughter's name. The personal obligation continued, but no action should be given against the daughter, since she declined her father's inheritance.

12 PAUL, *Replies, book 5:* Paul replied that when Sempronius, the first creditor, agreed that the debtor should mortgage the same property to a third creditor, the first was taken to have foregone his mortgage, and the third did not therefore succeed in his place. Hence, the position of the second creditor was improved. The same applied if the third creditor was a *res publica.* 1. When a mortgagee sues for the property mortgaged, his claim is defeated by any possessor who is willing to offer the amount due. The right of the possessor is not in issue, since plaintiff's claim is defeated once the mortgage is discharged.

13 TRYPHONINUS, *Disputations, book 8:* If the creditor offers the debtor an oath and the debtor swears that he does not owe the debt, the mortgage is discharged, since the effect is the same as if the debtor had been held not liable in an action. Even if the judge wrongly holds for the debtor in an action, the mortgage is discharged.

14 LABEO, *Posthumous Works, Epitomized by Javolenus, book 5:* You agreed with your tenant that goods brought on the premises leased should be hypothecated until the rent was paid or satisfaction given. Then you took a surety from the tenant for the rent. I think that you have received satisfaction, and so the goods brought on the premises are no longer hypothecated.

15 SCAEVOLA, *Digest, book 6:* The first creditor took a mortgage of certain lands, the second of part of those lands. The same person succeeded to the estates of both. The debtor offered to pay the amount borrowed from the second creditor. Scaevola replied that the offer must be accepted but the mortgage under the first contract remained valid.

TWENTY-ONE

1

THE EDICT OF THE AEDILE, RESCISSION, AND THE ACTION FOR DIMINUTION

1 ULPIAN, *Curule Aediles' Edict, book 1:* Labeo writes that the edict of the curule aediles concerns the sales of things immovable as much as of those movable or animate. 1. The aediles say: "Those who sell slaves are to apprise purchasers of any disease or defect in their wares and whether a given slave is a runaway, a loiterer on errands, or still subject to noxal liability; all these matters they must proclaim in due manner when the slaves are sold. If a slave be sold without compliance with this regulation or contrary to what has been said of or promised in respect of him at the time of his sale, it is for us to declare what is due in respect of him; we will grant to the purchaser and to all other interested parties an action for rescission in respect of the slave. The purchaser, however, will have to make good in such cases all of the following: any deterioration in the slave after the sale and purchase which is attributable to the purchaser himself, his household, or procurator; anything born of or acquired through the slave since the sale; and anything else that accedes to the slave consequent upon the sale or any profits which the purchaser acquires through him. Equally, there will be due to the vendor any accessories which he himself may have provided. Again, vendors must declare at the time of sale all that follows: any capital offense committed by the slave; any attempt which he has made upon his own life; and whether he has been sent into the arena to fight wild animals. On these grounds, also we will give the action. In addition, we will grant the action if it be alleged that a slave has been sold, with deliberate wrongful intent, in contravention of our provisions." 2. This edict was promulgated to check the wiles of vendors and to give relief to purchasers circumvented by their vendors. It must, though, be recognized that the vendor is still liable, even though he be unaware of the defects which the aediles require to be declared. There is nothing inequitable about this; the vendor could have made himself conversant with these matters; and in any case, it is no concern of the purchaser whether his deception derives from the ignorance or the sharp practice of his vendor. 3. It must, however, be known that these provisions do not apply to sales by the imperial treasury. 4. But if some *civitas* make a sale of anything, this edict is operative. 5. It applies also to sales of the property of a *pupillus*. 6. If a defect in or disease of the slave be perceptible (and defects reveal themselves generally through symptoms), it may be said that the edict has no place; its concern is simply to ensure that a purchaser is not deceived. 7. It is to be noted that a definition of disease as an unnatural physical condition whereby the usefulness of the body is impaired for the purposes for which nature endowed us with health of body appears in Sabinus. Such condition may affect the whole body or only part thereof. (Tuberculosis and fever exemplify the former; blindness, even from birth, the latter.) Defect, he says, is very different from disease; stammering, for instance, is a defect rather than a disease. Personally, I am of opinion that the aediles employed a pleonastic expression to preclude any doubt. 8. So if

there be any defect or disease which impairs the usefulness and serviceability of the slave, that is a ground for rescission; we must, however, bear in mind that a very minor flaw will not lead to his being held defective or diseased. Thus, a slight fever or an old quartan, which can now be ignored, or a trivial wound will entail no liability, if it be not declared; such things can be treated as beneath notice. So let us give examples of slaves who are genuinely defective or diseased. 9. The question is raised in Vivian whether a slave who, from time to time, associates with religious fanatics and joins in their utterances is, nonetheless, to be regarded as healthy. Vivian says that he is; for he says that we should still regard as sane those with minor mental defects; otherwise, he proceeds, the position would be reached that on this sort of ground, we would deny that slaves are healthy without limit, for example, because he is frivolous, superstitious, quick-tempered, obstinate, or has some other flaw of mind. The undertaking relates to physical, not mental, health. Still, says Vivian, it does happen that a physical defect affects the mind also and makes the slave thereby defective; it can happen that he becomes mentally deranged by reason of a fever from which he suffers. What happens in such circumstances? If the mental defect be such that the vendor ought to reveal it or reserve it and, although he may know of it, he does not declare it, he will be liable to an action on the purchase. 10. Vivian says further that although, at some time in the past, a slave indulged in Bacchanalian revels around the shrines and uttered responses in consonance therewith, it is still the case that if he does it no longer, there is no defect in him and there will be no more liability in respect of him than if he once had a fever; but if he persist still in that bad habit, cavorting around the shrines and uttering virtually demented ravings, even though this be the consequence of excess and thus a defect, it is still a mental, not a physical, defect and so constitutes no ground for rescission, because the aediles pronounce in respect of physical defects; however, such facts give occasion for the action on purchase. 11. Vivian says the same in respect of slaves who are excessively timorous, greedy or avaricious, quick-tempered,

2 PAUL, *Curule Aediles' Edict, book 1:* prone to fits of depression,

3 GAIUS, *Curule Aediles' Edict, book 1:* impudent or wanton, hunchbacked, deformed, prone to the itch or covered with scales; the deaf and the dumb are also included.

4 ULPIAN, *Curule Aediles' Edict, book 1:* For all these defects, for which he says that rescission is not applicable, Vivian would give the action on purchase. 1. But if a physical affliction should have mental consequences, say that the slave raves in consequence of his fever or wanders through the city quarters, talking nonsense in the manner of the insane, there is, in such cases, a mental defect flowing from a physical one, and consequently, rescission will be possible. 2. Pomponius reports that there have been those who made reply that the edict does not apply to gamblers or wine bibbers, gluttons, impostors, liars, and the quarrelsome. 3. Pomponius, again, says that although a vendor is not required to produce a slave of full intellect, still if he sell one so silly or moronic that he is useless, there is a defect under the edict. Generally, the rule which we appear to observe is that the expression "defect and disease" applies only in respect of physical defects; a vendor is liable in respect of a defect of mind, only if he undertake liability for it; otherwise, not. Hence, the express reservation of the wandering or runaway slave; for their defects are of the mind, not physical. It is for this reason that there are those who say that animals prone to shy or kick are not to be accounted diseased; for such defects are of the mind, not the body. 4. All in all, if the defect be only one of the mind, there will be no rescission, unless the vendor has stated that such defect does not exist when, in fact, it does; an action on purchase, however,

will lie, if the vendor, knowing of such defect of mind, should not reveal it. But if the defect be wholly physical or a combination of the physical and nonphysical, there is scope for rescission. 5. A rider has to be borne in mind, that is, that the general statement, disease, does not postulate a serious disease; as Pomponius says, this is no occasion for astonishment; for in the present context, there is no concern with what it is to which the specific disease is an obstacle. 6. Pomponius further says that not every disease gives ground for rescission—take the case of a minor inflammation of the eyes, a slight toothache or earache or a sore scarcely worthy of notice; equally, not any trivial feverishness will come within the edict.

5 PAUL, *Sabinus, book 11:* And just as there is a distinction between those defects which the Greeks describe as a malignant form of disease and those which they categorize as ills, disease, or sickness, so there is a distinction between these faults and a disease whereby the usability of a slave is reduced.

6 ULPIAN, *Curule Aediles' Edict, book 1:* Pomponius correctly says that this edict concerns not only chronic diseases but also those which are temporary in effect. 1. Trebatius says that impetigo is not a disease, if the slave can use normally the affected limb, and I think Trebatius to hold the correct view. 2. To me it appears the better view that a eunuch is not diseased, any more than one who, having one testicle, is capable of procreation.

7 PAUL, *Sabinus, book 11:* But if a slave be a eunuch in such wise that he lacks a necessary part of his body, he is diseased.

8 ULPIAN, *Curule Aediles' Edict, book 1:* The question arises whether one whose tongue has been cut out is healthy. This problem is dealt with by Ofilius in respect of a horse. His opinion is in the negative.

9 ULPIAN, *Sabinus, book 44:* Sabinus says that a dumb slave is diseased; for it appears a disease to be without a voice; but one who speaks with difficulty or unclearly is not diseased; the slave whose speech is unintelligible, however, obviously is diseased to that extent.

10 ULPIAN, *Curule Aediles' Edict, book 1:* Ofilius, again, says that if the slave has lost a finger or suffered the laceration of some limb, even though the injury be healed, he will not be regarded as healthy, if his usefulness be diminished thereby. 1. I read Cato to have written that a slave who has had a finger or toe cut off is diseased; this is true, subject to the distinction already adumbrated. 2. Even when he has more, whether fingers or toes, if the loss does not impede his utility, there is no question of rescission; the issue is, therefore, not how many he has lost but, whatever their number, whether he can still be put to use. 3. It has been asked whether a slave suffering from short sight is healthy. I think him a case for rescission. 4. It is accepted that a dim-sighted person is diseased, that is, one who sees neither by day nor by night, who is so styled by the Greeks; there are those who think this to be the condition of one who, even when light be brought, sees nothing. 5. It has been asked whether those are healthy who stammer, lisp, are inarticulate, speak with difficulty, ramble, or rave. I think that they are.

11 PAUL, *Sabinus, book 11:* One who lacks a tooth is not diseased. Most men lack some tooth or other but are not thereby diseased. The more so, since we are born without teeth and are not treated as any the less healthy until we cut teeth; any other view would mean that no old man would be healthy.

12 ULPIAN, *Curule Aediles' Edict, book 1:* One with warts or with polypuses in the nose is diseased. 1. Pedius writes that a man who has one eye or one jaw bigger than the other is healthy, so long as he can use both properly; for he says that a discrepancy

between jaws, eyes, or arms is no ground for rescission if it does not affect the slave's ability to perform his duties. But imbalance, or the fact that one leg is shorter than the other, can be a hindrance to such performance; and so a slave, thus affected, is for rescission. 2. If a slave speak gutturally or have protruding eyes from birth, he is regarded as healthy. 3. It should also be known that left-handedness is neither a defect nor a disease, unless the slave use his left hand by reason of the weakness of the right, such a slave is not left-handed but defective. 4. It has been asked whether one whose breath smells is healthy. Trebatius says that it is not a disease that one's breath smells like that of a goatherd or scabrous person for this is an accident of exhalation. But if it be due to a bodily defect, such as a liver- or lung-complaint or something similar, the slave is diseased.

13 GAIUS, *Curule Aediles' Edict, book 1:* Again, one with a limp is diseased.

14 ULPIAN, *Curule Aediles' Edict, book 1:* It has been asked whether a slave-woman who regularly produces stillborn issue is diseased. Sabinus says that she is, if this be due to some defect in her private parts. 1. All are agreed that a pregnant woman, the object of a sale, is healthy; for it is the highest and particular lot of woman to conceive and conserve what she conceives. 2. A woman in labor is also healthy, unless some extrinsic factor affect her body with some form of ill-health. 3. Where a barren woman is concerned, Caelius says that Trebatius took a distinction: If she be naturally barren, she is healthy, but not if her infertility be due to some bodily defect. 4. A question has similarly been raised about the bed wetter. And Pedius says that a man is not to be adjudged diseased because, being asleep, in drink, or too lazy to get up, he wets his bed; but if it be a disease of the bladder which prevents his continence, his sale may be rescinded on the ground of that disease, but not on the ground that he wets the bed. Pedius is right. 5. He also says that if some slave's birthmark be removed, the possibility of rescission is removed rather than presented, since the disease is reduced. I myself think that if the disease be no more, there is no case for rescission, but if the disease continue, rescission is possible. 6. If a man be born with fingers joined together, he is not regarded as healthy, at any rate if this impede the use of his hand. 7. It is generally agreed that a woman who is so tight that she cannot fulfill the function of a woman is not deemed healthy. 8. The question arises whether a sufferer from swollen tonsils can be the object of rescission as being defective. My view is that if the tonsils be what I have in mind, that is, such swellings of the throat as the slave had from birth and which cannot now be cut out, the slave whose tonsils are a problem is defective. 9. If the vendor expressly exclude some disease and, for the rest, declare the slave healthy or give security in respect thereof, the agreement made is to be observed (for there is no return for those who forego their redress) unless the vendor, knowing of the disease, deliberately kept silent about it; in such a case, the defense of fraud will be available. 10. If a disease be not expressly excluded but be such as to be apparent to all (as when the slave be blind or have a dangerous and manifest scar on his head or some other part of his body), there is no liability on that account, says Caecilius, any more than if it had been expressly excluded; for it has to be accepted that the aediles' edict is concerned with those defects which a purchaser might not detect or be able to detect.

15 PAUL, *Sabinus, book 11:* One who menstruates twice within a month is not healthy any more than one who never menstruates, unless this latter be by reason of her age.

16 POMPONIUS, *Sabinus, book 23:* A slave so cured that he is restored to his original state is to be regarded as though he was never afflicted with disease.

17 ULPIAN, *Curule Aediles' Edict, book 1:* Ofilius tells us what a fugitive is: He is one

who remains away from his master's house for the purpose of flight, thereby to hide himself from his master. 1. But Caelius says that he, too, is a fugitive who leaves with the intention of not returning but, changing his mind, returns; for, he says, no one purges his offense by remorse. 2. Cassius says simply that a fugitive slave is one who with deliberate intent leaves his master. 3. And we find in Vivian that a fugitive is to be so determined from his attitude of mind and not merely from the fact of his flight; for a slave who flees from an enemy or brigand, a fire, or the collapse of a building, certainly runs away, but he is not a fugitive. In the same way, a slave who runs away from the instructor to whom he was entrusted for training is not a fugitive, if the reason for his running away be the intolerable treatment which he receives. Vivian says the same, if that be the reason for his running away from someone who borrowed him. He says the same if the slave were savagely used. All this applies to those who, having fled, return to their masters; but, says Vivian, if they do not return, then they are unquestionably fugitives. 4. The same Vivian further says that when consulted about a slave who hid in the house until he could find the opportunity for flight, Proculus said that though he could not be regarded as already in flight, being still in the house, he was nonetheless a fugitive; but if he concealed himself until his master's wrath abated, he would not be a fugitive any more than one who, having in mind that his master wished physically to chastise him, betook himself to a friend whom he induced to plead on his behalf. It cannot even be said that a slave is a fugitive who has come to the stage that he hurls himself from a height (though one could declare a fugitive one who goes up to a high point of the house to cast himself down); rather does he desire to end his life. Vivian also says that the common assertion, particularly of the ignorant, that a slave who stays away for a night is a fugitive, if it be without his master's consent, is not true; one has to assess the man's purpose in so acting. 5. Vivian goes on to say that if a slave leave his master and come back to his mother, the question whether he be a fugitive is one for consideration; if he so fled to conceal himself and not to return to his master, he is a fugitive; but he is no fugitive if he seeks that some wrongdoing of his may be better extenuated by his mother's entreaties. 6. Caelius also writes that if you buy a slave who throws himself into the Tiber, he will not be a fugitive so long as his only motive was the desire to end his life; but if he first planned to run away and then, changing his mind, flung himself into the Tiber, he would be a fugitive; he says the same of a slave who throws himself from a bridge. And all that Caelius says is correct. 7. Caelius further says that if your slave in running away from you takes with him his *vicarius* and the latter goes unwillingly or not knowing what it is all about and seeks the opportunity to return, he will not be deemed a fugitive; but if he knew at the time of flight what was going on or later became aware of it and chose not to return to you when he could do so, the *vicarius* would himself be a fugitive. He thinks the same to apply to a slave abducted by a kidnapper. 8. The same Caelius says that if a slave on a country estate leaves the house with the intention of running away but is caught by someone before he has left the confines of the estate, he is a fugitive; for his intention makes him so. 9. He further says that a slave who takes a step or two in flight or, indeed, begins to run but cannot escape his master who is in pursuit is a fugitive. 10. As he rightly says, flight is a form of liberty in that the slave is for the present relieved of his master's power. 11. A slave, the object of a pledge, indeed has the debtor as his owner, but should he take himself off when the creditor enforces his right, he will be deemed a fugitive. 12. In Labeo and Caelius, the question is raised whether a slave who seeks asylum or betakes himself to a place frequented by those who declare themselves for sale is a fugitive; I think that a slave who does what it is adjudged permissible to do publicly is not a fugitive. No more do I

regard as a fugitive a slave who flees to the emperor's statue; for he does not so act with the intention of running away. Likewise, I think of a slave who seeks asylum or other sanctuary, because he does not do so with the intention of running away; but if he first runs away and then takes shelter, he does not cease to be a fugitive. 13. Caelius again writes that in his opinion, a slave is a fugitive who takes himself somewhere whence his master cannot recover him and still more so one who repairs to a place from which he cannot be removed. 14. Labeo defines a wanderer as a petty fugitive and, conversely, a fugitive as a great wanderer. However, if we wish to be accurate, we define a wanderer as one who does not indeed run away but frequently indulges in aimless roaming and, after wasting time on trivialities, returns home at a late hour. 15. The following case is recorded in Caelius: A freedman was living with his patron in such circumstances that the whole premises were locked with one key; a slave of the freedman was beyond the latter's quarters but still within the patron's establishment with the intention of not returning to him and concealed himself for the whole night; Caelius says that he should be deemed a fugitive. Of course, says Caelius, if the establishment was not of the type above indicated and the freedman dwelt in a room to which there was common and general access to and from several rooms, the answer would be different; Labeo takes the same view. 16. Caelius again says that a slave, sent off to a province by his master, who learns that the master is dead and has emancipated him in his will and who continues in the same office but acting for himself as a freeman is not a fugitive; he adds that he would not be a fugitive even if he falsely declared himself free because it is not done with the object of flight. 17. When the aediles say, "he is not free from noxal liability," that means, not that the vendor must declare the slave not to have committed a delict, but that he must declare that the delictal liability has been discharged, that is, that no noxal action will lie in respect of the slave. Hence, if he did commit a delict which no longer remains, he is free from noxal liability. 18. Noxal liability derives from private delicts in respect of which noxal actions are granted, not from offenses entailing public prosecution; special provision is made later concerning capital offenses. Noxal actions result in a pecuniary penalty, where a master prefers not to hand over the slave in noxal surrender but rather to accept the award of the court. 19. If the slave be such that imperial rulings preclude his ever being manumitted or if he has been sold by his master in fetters or if he be sentenced by some authority or if he is to be exported, it is absolutely proper that this should be declared. 20. If a vendor asserts that the slave has some quality which he has not or that he has not some quality which he has, he will be liable; he might, for instance, say that the slave is not a thief when he is, or that he is a craftsman when he is not. Such a vendor in not making good his assertion is held to contravene his statement or promise.

18 GAIUS, *Curule Aediles' Edict, book 1:* If the vendor makes some assertion about a slave and the purchaser complains that things are not as he was assured that they were, he can proceed by the action for rescission or that for a diminution in which an assessment is made. Suppose that the vendor says that the slave is loyal or hardworking or diligent or vigilant or that through his thrift, he has acquired a *peculium* and, on the contrary, he is fickle, wanton, slothful, sluggish, idle, tardy, or a wastrel. All these expressions of the vendor are not to be charged against the vendor with absolute literalism but should be reasonably interpreted. Hence, if he declare the slave to be loyal, one does not expect the absolute gravity and fidelity of a philosopher; if he declare him hardworking and watchful, he is not required to work all day and all night. All these qualities should be expected within reason and we hold the same of other assertions of the vendor. 1. If a vendor say that the slave is an excellent cook, he

must supply a leader of his profession; but one who says simply that he is a cook meets his obligations, even though the slave be but a mediocre cook. The same applies to other trades and crafts. 2. In like manner, if he say simply that the slave has a *peculium*, it is enough that he has even the most exiguous *peculium*.

19 ULPIAN, *Curule Aediles' Edict, book 1:* We have, however, to realize that there are statements that a vendor might make which he does not have to validate, namely, those which simply extol the slave; for instance, that he is thrifty, upright and obedient. In the words of Pedius, there is a great difference between what is said to commend the slave and an undertaking to make good what is stated. 1. The vendor would clearly be liable on an assertion that the slave is not a gambler or a thief or that he has never sought refuge at the emperor's statue. 2. We distinguish a statement from a promise in the following manner: A statement is that which is declared *simpliciter* and ends therewith; but promise can relate to a mere undertaking, a formal promise, or a contractual undertaking by *sponsio*. Accordingly, one who gives a *sponsio* in these matters, when the question is put to him, becomes liable to an action both on the stipulation and for rescission; and there is nothing strange in the fact that one liable to the action on purchase should be liable to the action for rescission. 3. Only those utterances are regarded as statements and promises which are so expressed that they must be made good, not those which are merely thrown out. 4. This too must be known: If the vendor promise or state that the slave is a craftsman, he is not required to provide a master craftsman but one of adequate experience; so that the purchaser is not to get one of consummate skill nor yet one unlearned in his craft, it is enough that he be a run-of-the-mill craftsman. 5. The aediles then say: "We will give an action to the purchaser and all other interested parties." They thus promise an action to the purchaser and his universal successors. By "purchaser," we understand one who buys for a money price. But if there be an exchange or barter, then each party is to be treated as both vendor and purchaser, and so each can proceed under this edict. 6. The period for the action for rescission is six months of business days; but if the slave be not returned but the action for diminution be brought, a year of business days is open. The time for rescission runs from the date of the sale or that on which the statement or promise was made.

20 GAIUS, *Curule Aediles' Edict, book 1:* If, though, the statement intervene before the time of sale and the stipulation be made some days after, Caelius Sabinus writes that time runs from the earlier date. And that, he says, is as soon as the slave is sold so that action can be brought as from then.

21 ULPIAN, *Curule Aediles' Edict, book 1:* To rescind is to bring it about that the vendor has again what he previously had; and since this is effected by returning the thing, the process is called rescission, as being a return. 1. When a slave is returned to the vendor by a purchaser, Pomponius says that undertakings in respect of fraud are required, so that guarantees are necessary against the possibility that the purchaser may have pledged the slave or that, at the purchaser's instigation, the slave may have been guilty of theft or of inflicting damage. 2. Pomponius further says that sometimes such guarantees are requisite on a twofold basis in respect of both the past and the future; suppose, say, that the purchaser or his procurator accept a judgment in respect of the slave whom he now returns, whether because he was the defendant or because he himself brought proceedings in respect of the slave. He also says, however, that security is to be given that if the purchaser be condemned or give something, there being no element of fraud in the matter, this must be made good to him and, equally, if he received anything from proceedings which he himself brought and, through his fraud or remissness, none of it remains, he must make that good to the vendor. 3. Pomponius goes on to say that a *cautio* for the future is required where a vendor

sells a slave, knowing his defects, and is condemned in this action, although, at the time, the slave is, through no fault of the purchaser, a runaway; for in such a case, the purchaser should give a *cautio* that he will go after the slave and, having regained his power over him, restore him to the vendor,

22 GAIUS, *Curule Aediles' Edict, book 1:* as also that neither he nor his heir will prevent the vendor from holding the slave.

23 ULPIAN, *Curule Aediles' Edict, book 1:* Now when rescission is effected, if the slave has been reduced in value, whether mentally or physically, by the purchaser, the latter will have to make this good to the vendor; illustrations would be the debauching of the slave or the fact of the purchaser's cruelty making him a fugitive. Pomponius thus says that, whatever the ground of his deterioration, it is a matter for the judge to quantify, and his estimate will be due to the vendor. But if the slave be returned without legal proceedings but the purchaser be unwilling to make good these other matters of which we have spoken, the vendor will have the action on sale. 1. The aediles direct that any acquisitions either way shall be restored so that when the sale is ended, neither party obtains more than he would have had if the sale had never been concluded. 2. An exception to this is the slave who commits a capital offense. To commit a capital offense is to be guilty of wrong which could be punished by death. The earlier jurists visited what was a wrong, in fact, with a penalty. We now require deliberate intent and wickedness for a capital offense; so that if the slave commit the wrong in error or by accident, the edict does not apply. Pomponius, accordingly, says that neither an *impubes* nor a lunatic can be thought capable of a capital offense. 3. Also excepted is the slave who does something to end his life. He is deemed a bad slave who does something to remove himself from human affairs, for example, he strangles himself or drinks a poisonous potion, casts himself from a height, or does something else in the hope of resulting death; it is as though there is nothing that he would not venture against others, who dares to do it against himself. 4. If a slave or son-in-power make a sale, the aedilician action lies against the master or head of household to the extent of the *peculium*; for although these actions are deemed penal, nevertheless they stem from contract, and so it must be held that they lie also in respect of transactions of those in another's power. Equally, if a daughter-in-power or a slave-woman sell something, it has no less to be said that the aedilician actions lie. 5. These actions stemming from the edict also lie against heirs, generally. 6. Again, if one acting in good faith as my slave (whether a freeman or the slave of someone else) make a sale, it can be said that this edict covers them also. 7. Julian says that the decision in an action for rescission should be that both parties, that is, vendor and purchaser, be restored, in effect, to their original positions. 8. Hence, if the slave steal from his purchaser or from someone else, whoever it be, so that the purchaser has to make amends for the theft, the return of the slave to the vendor will not be directed, unless the latter indemnify the purchaser. What, then, says Julian, if the vendor is not prepared to take the slave back? He says that he is not required to make good anything else but will be condemned for no more than the amount of the price; the purchaser, he says, has to bear the loss that he incurred through his own fault because, when he could have delivered the slave in noxal surrender, he preferred to submit to an assessment of damages. In my view, Julian's opinion has a lot of good sense. 9. When a slave is thus returned, any acquisition that the purchaser has made through him or which he has not made by reason of his own fault is also to be restored: not only profits that he personally takes or remuneration that he receives from the slave himself or the slave's hirer but also anything received from the vendor, on account that he gave the slave to him late; again, the purchaser must make over any profit that he receives from some other possessor of the slave, as also anything that he receive by way of profit; the same holds if some legacy or inheritance has come to the slave. For this purpose, it is irrelevant whether the vendor would or would not have made these acquisitions, if he

had not sold the slave; let us suppose that he would not have been able to take anything under the will that does not redound to his detriment. Pedius, indeed, thinks that we do not have to consider the intention of the testator in making the slave his heir or a legatee because, even supposing him never to have been sold, the purchaser would derive no benefit therefrom; conversely, says Pedius, if it be advanced that the slave was instituted heir with the vendor in mind, still we would have to say that a purchaser who does not choose to return the slave will not have to give up the inheritance to the vendor.

24 GAIUS, *Curule Aediles' Edict, book 1:* It may be stated generally that it is deemed just that there should be returned to the vendor anything that the purchaser acquires through the slave other than what is so acquired through the purchaser's own property.

25 ULPIAN, *Curule Aediles' Edict, book 1:* The aediles require the buyer to make good any deterioration in the slave, but only that occurring subsequent to the sale and delivery; he bears no liability in the action for anything happening before then. 1. Accordingly, whether the purchaser himself, his household, or his procurator produce the deterioration, he is liable to an action. 2. The term "household" includes all who are in a condition of servitude to him, be they freemen in the honest belief that they are his slaves or, in fact, the slaves of another, and also those who are in his parental power. 3. A procurator is mentioned in relation to this action. But Neratius says that "procurator" does not mean anyone at all, but one entrusted with general administration of his principal's affairs or one charged with the transaction which has reduced the slave's value. 4. Pedius says that it is but just that the purchaser should be liable only for what the slave has suffered at the hands of his procurator or household which he would not have suffered had he not been sold; but for what he would have endured if he had been unsold, if it was done by one of his slaves, the purchaser may surrender that slave noxally; if by his procurator, he will have only to cede to the vendor his actions against the procurator. 5. What if it be through remissness, not deliberate intent, on the part of the purchaser that the slave has deteriorated? He is equally to be condemned. 6. Deterioration can be not only physical but can also relate to defects of disposition; for instance, through following the example of his fellow slaves in the purchaser's household, he may have become a gambler, a wine-bibber or a wanderer. 7. It is, though, to be remembered that the purchaser cannot noxally surrender his own slave on this sort of ground; for he does not make amends in such case for the act of his slaves or procurator. 8. And it must further be borne in mind that the purchaser must make good all those things which are set out in the edict of the aediles if they occurred before joinder of issue. Therefore it is necessary to have them set out so that if any of them occurred before joinder of issue it may be made good. But, after joinder of issue, everything pertaining to the return of the slave comes into account, possible profits through him, deterioration of him, and the like. Once the judge has been appointed, it is his duty to ascertain all the matters which are pertinent to the action; but what precedes the launching of the proceedings is not strictly his affair unless it be expressly brought into issue. 9. The edict further adds: "Whatever money be paid in respect of the slave or given by way of accession, is not returnable; and there will be no release from any debt over which one is under obligation in the matter." 10. The course of proceedings provided by the aediles is that the purchaser should first make good to the vendor all that is set out above and thereafter recover the price.

26 GAIUS, *Curule Aediles' Edict, book 1:* Let us consider whether it is not unfair that the purchaser should be obliged to restore the slave and submit to the action on a judgment when he in the interim receives nothing because of the vendor's lack of means; would not the matter be better ordered, if the purchaser were to give an undertaking that if he receive his money within a specified period, he will return the slave?

27 ULPIAN, *Curule Aediles' Edict, book 1:* The purchaser is to recover the money that he paid for the slave and any accessions. We interpret this to mean not only the price

which the vendor got and interest, but anything laid out in respect of the purchase. But this is to be deducted only if the outlay was at the vendor's wish; if it be asserted that any such expense was incurred by the purchaser by his own will, that does not come into account; nor can he demand what someone, by his own choice, gave the vendor. Now what if a payment was made in respect of taxes which were levied on the purchaser? That, we say, is to be restored; for the purchaser is to be fully indemnified.

28 GAIUS, *Curule Aediles' Edict, book 1:* Should the vendor not give an undertaking on the matters contained in their edict, the curule aediles promise against him an action for rescission within two months and an action for diminution within six.

29 ULPIAN, *Curule Aediles' Edict, book 1:* It should be known that if the purchaser does not make good to the vendor what is required in this action, the vendor will not be condemned to him; but if the vendor similarly fails to make good to the purchaser, he will be condemned to him. 1. It is also due to the purchaser that he be discharged from any debt for which he is under obligation, whether to the vendor himself or to some other person. 2. Condemnation is for what the thing is worth. Can it then exceed the actual price or not? Condemnation will be for the price and accessions. Should the purchaser receive interest, as being entitled to get what the transaction has been worth to him, especially as he himself restores any profits? He will certainly receive interest. 3. If he has suffered some loss or incurred expense for the slave, the purchaser will recover therefor at the judge's discretion, not, however, as Julian says, so that the vendor will be condemned to him in respect of these heads of claim as such, but on the footing that he will not be required to return the slave to the vendor until he himself has been indemnified.

30 PAUL, *Curule Aediles' Edict, book 1:* Again, if a purchaser accept proceedings in the matter of the return of a slave or, indeed, himself bring an action in respect of him for that purpose, each of the parties must undertake that if he be fairly condemned for anything or if he receive anything through the proceedings or dolosely fail to receive it, that will be restored. 1. The purchaser can recover necessary expenses in curing the slave, incurred after the joinder of issue; prior expenses must be specifically itemized says Pedius; Aristo says, though, that the slave's food does not come into account for he was in the purchaser's employ.

31 ULPIAN, *Curule Aediles' Edict, book 1:* But if the vendor should refuse to take the slave back, he [Julian] says that he is not to be condemned for more than the price. For any damage he has suffered on account of the slave, we simply allow the purchaser to retain him physically. Though the vendor can avoid making reparation for these things, he will not escape having to make good the price and whatever goes with the price. 1. If the vendor proclaim or promise that the slave is not a thief, he will be bound by his promise if the slave should commit theft; in the present context, we regard as a thief not only one who steals from a stranger but also one who steals from his master. 2. If a slave-woman be the object of rescission, there must be returned with her any issue born to her after the sale, whatever their number. 3. And if perchance a usufruct should have been added to the ownership, that must unquestionably also be returned. 4. What do we say of any *peculium* which the slave acquires while with the purchaser? If it comes from the purchaser's patrimony, it must stay with the purchaser, but if it comes from any other source, it must be handed over to the vendor. 5. Suppose that the purchaser has several heirs; then, we have to consider whether all must agree to a rescission. Pomponius says that all must agree and appoint one of themselves procurator so that the vendor does not incur harm by receiving his share of the slave from one and being required to pay to another a part of the price for the slave's not being worth that price. 6. He says further that if the slave be dead or already returned, each of the heirs can legitimately sue for his share; the heirs will recover the price in proportion. They will equally be liable in proportion for any profits or accessions to or deterioration in the slave, unless it be such as does not admit of

apportionment, say, the issue of a slave-woman. Over such issue, the same rule is observed as applies to the sale of their mother, and we do not accept that she could be partially returned. 7. Then Marcellus writes that if a slave owned in common buy a slave and the question of rescission arises, one of the co-owners cannot return the slave, so far as his share in the slave purchaser is concerned, any more than, as he puts it, when the purchaser has several heirs and they do not unanimously agree to rescission and return of the slave. 8. Marcellus further says that one of the co-owners cannot, by the action on purchase, require the vendor to make partial delivery to him, when he pays part of the price; the same, he says, holds true for purchasers; for the vendor retains the object of the sale by way of pledge until the purchaser gives him satisfaction in the matter. 9. Then Pomponius says that if one of the heirs, his household, or his procurator diminish the slave in value, whether by accident or by design, that heir will properly be liable in full at the judge's discretion, and that this is the more appropriate when all of the heirs have appointed one of their number as procurator in legal proceedings. In such a case, if it be the fault of one heir that the slave is reduced in value and redress be made in respect thereof, the other heirs can have the action for dividing the inheritance against that heir, because he is the reason why they suffer loss and are not able to make a return of the slave. 10. If the vendor should have several heirs, the slave can be returned in the ratio of the hereditary proportion of each. The same applies if a slave, the common property of several, be sold. If one slave be sold by several owners or several be sold by one or if several slaves be bought from one vendor, the better solution is that if they appeared as multiple vendors of the slave, return must be made to them *en bloc*; but if individuals buy a share in the slave, it is rightly said that one may claim for rescission while another proceeds for a diminution in the price. Again, if several purchasers each buy their own share of the slave from a single vendor, then each can take proceedings in respect of his own share; but if they buy the slave as a whole, each must restore him as a whole. 11. If the slave to be returned be dead, the question arises whether his death be due to the fault of the purchaser, his household, or procurator; for if that should be the case, the slave is to be treated as though still alive; and all is to be made good that would have to be if he were still alive. 12. When we speak of negligence in this context, we mean any negligence, not only that which is gross. In consequence, it has to be said that whatever the occasion the purchaser provided for the slave's death, he is liable; so also if he did not summon a doctor so that the slave might be healed, or inflicted an ill on him, through his own fault. 13. But what we have said applies if the slave die before issue is joined; if, however, it be alleged that the slave died after that stage, it will be for the judge to decide the manner of his demise. Pedius also is of the view that what happens after joinder of issue is a matter for the judge's deliberation. 14. What we have said regarding a procurator holds good also in respect of a tutor, curator, or anyone else who, by virtue of his duties, intervenes for a third person; Pedius so writes and adds that the principal is not unjustly required to undertake that there will be no negligence on the part of those charged by him with the administration of affairs. 15. Pedius, again, says that the term "household" includes sons-in-power; his view was that the plaintiff in an action for rescission should make good the deeds of the members of his household. 16. If the purchaser brings the action for diminution on the ground that the slave has run away and subsequently sues because he is diseased, for how much should judgment be given? That this action may be brought more than once, there is no question; but Julian says that the conduct of proceedings must be such that the purchaser does not make a profit and recover the value of the thing twice over. 17. An *actio in factum* lies to recover the price, if the slave be returned; in this action, the question is not raised whether the slave be such that there were grounds for his return, only whether he has been returned; and there are good reasons for this. It would be unfair that once the vendor by taking him back acknowledged that the slave was such as should be returned, inquiry should be made still, whether he should or should

not have been returned; nor is there any inquiry whether he was returned within the set period for such return. 18. The one thing which this action requires is that the slave be returned; unless he be returned, the action does not lie, even though there be an informal agreement for his return. Accordingly, an agreement for return does not give rise to this action, only actual return of the slave. 19. There must, though, be restored through this action what went with the slave in the sale. 20. Since the stipulation for double the price is customary, it is further accepted that the purchaser can bring the action on purchase, if the vendor does not make that stipulation in respect of the slave; for those matters which exist by practice and custom come within actions based on good faith. 21. Those selling slaves should declare their nationality when making the sale; for the slave's nationality may often induce or deter a purchaser; therefore, we have an interest in knowing the nationality; for there is a presumption that some slaves are good, coming from a race with no bad repute, while others are thought bad, since they come from a notorious people. If, then, the slave's nationality be not declared, an action will be given to the purchaser and to all interested parties whereby the purchaser may return the slave. 22. If the slave be sold on the terms that he may be returned, if he does not prove satisfactory within a specified period, that agreement is to be honored. But if no period be specified, the purchaser will have an *actio in factum* for rescission within sixty business days, no more. If, though, it be agreed that rescission be possible without limit, I think that such an agreement is valid. 23. If the prescribed sixty days should have elapsed, an action will be given, after investigation of the matter; such investigation will be directed to such issues as whether default was due to the vendor, whether there was no one available to whom return could be made, and whether there was some good reason why the slave, who has proved unsatisfactory, was not returned in the prescribed period. 24. Now in these actions, all must be complied with which has been stated, concerning profits, accessions, and issue, and concerning the return of a deceased slave. 25. The jurists have taken the view that what accedes to the thing purchased is part of the sale.

32 GAIUS, *Curule Aediles' Edict, book 2:* What has been earlier said, namely, that the vendor is required to declare defects and diseases and the other matters set out and that, moreover, the slave is not within any of these provisions, as he promises, applies also where the slave is sold as an accessory to something else so that he is required to make the same declarations and promises. This must be held to apply not only in the case where, say, the slave Stichus is expressly stated to go with a piece of land but also where all the slaves on the land are to be part of the sale of the land.

33 ULPIAN, *Curule Aediles' Edict, book 1:* Accordingly, Pomponius says that it is just that what is stated to be an accessory to the sale should be made good in full, just as the principal object of the sale; for the action on purchase lies at civil law for accessories to be intact, as, for instance, if wine jars be declared to go with an estate. But this applies where a specific thing is stated to be an accessory. If a slave be sold with his *peculium*, the vendor does not have to vouch the health of any slaves forming part of the *peculium*, because he did not say that specific things would be necessary to the slave, the object of sale, but he would have to furnish the *peculium*, such as it is, and here, as generally, he does not have to provide a specified amount of *peculium*. Pomponius adopts the same reasoning where the inheritance or *peculium* of a slave is sold; the aediles' edict has no operation in respect of the individual elements of the inheritance or *peculium*. He says the same when land is sold complete with its equipment and there are slaves among the equipment. I think this view sound, unless the parties be said to have made some special contrary agreement. 1. If the thing sold be returned, a slave accessory to the thing must also be returned, even though there be no flaw in him.

34 AFRICANUS, *Questions, book 6:* [Julian] says that when several slaves of the same kind, actors, for instance, or a chorus, are sold, it is important to know whether the price is settled as for the group as such or per individual; so that sometimes a single

sale is contracted, sometimes several sales; this is relevant to the question whether, when one of them be defective or diseased, only he or all are to be returned. 1. It is sometimes the case that even though the price be fixed per individual, there is a single sale so that all may or must be returned because of a defect in one of them; this is so when it is obvious that there would be no sale or purchase unless all went together, as is usually the case with a troupe of actors, a four-horse team, or matched mules; it would be to the advantage of neither party to have other than the full complement.

35 ULPIAN, *Curule Aediles' Edict, book 1:* Healthy slaves are generally returned on account of those who are diseased when they cannot be separated without great inconvenience or affront to family ties. Suppose that I wish to return the parents but keep their son or vice versa. The same is true in respect of brothers and those linked in a servile quasi-matrimonial relationship.

36 POMPONIUS, *Sabinus, book 23:* Where several slaves are sold at a single overall price and we resort to the aedilician action in respect of one of them, an estimate of his quality alone is to be made, if the price was fixed for them all as, so to speak, a "job lot." But if all were sold for so much on the basis of a definite price per slave, so that the sum paid is the total of the individual prices, then we must claim the price of the individual slave, be it one of the higher or one of the lower prices.

37 ULPIAN, *Curule Aediles' Edict, book 1:* The aediles ordain that a slave of long standing is not to be sold as one newly enslaved. This edict counters the wiles of vendors; for the aediles ensure generally that purchasers shall not be circumvented by their vendors. Now many dealers are in the habit of selling as new slaves those who are not so in order to get a better price; for it is assumed that the more recently he has been enslaved, the slave will be more malleable, more trainable to his function, more responsive to direction, and more adaptable to any service; on the other hand, it is difficult to retrain an experienced slave or one of long standing and to mold his habits. And since slave dealers know that their customers will readily seek to purchase new slaves, they interpose those of long standing and sell them as new. In this edict, the aediles lay down that this is not to happen: Accordingly, if such a sale be made to an unsuspecting purchaser, the slave will be returned.

38 ULPIAN, *Curule Aediles' Edict, book 2:* The aediles say: "Those who sell beasts of burden must declare with all due publicity any disease or defect which the beasts have and must deliver them to purchasers in the best trappings in which they were displayed for sale. Should this not be complied with, we will grant an action for the trappings or the return of the animals because of the trappings within sixty days; but if the sale is to be rescinded because of a defect in or disease of the beast, the action will lie for six months, or if a diminution of the price be sought, for a year. Should beasts be sold together as a pair and there be a ground for rescission in respect of one of them, we will grant an action for rescission in respect of both." 1. The aediles here speak of rescission of the sale of beasts. 2. The reason for this edict is the same as that for the return of slaves. 3. And in effect, the same applies as in respect of defects in or diseases of slaves, so that what we have said of them should be transferred to the present context. And should a beast be dead, rescission is possible in the same way as in respect of a slave. 4. Does the designation "beasts of burden" cover cattle of every kind? This can scarcely be the case; for "beast of burden" means one thing, "cattle" another. 5. Hence, there is appended to this edict a clause which runs as follows: "What we have proclaimed in respect of the soundness of beasts of burden vendors must observe in respect of all other cattle." 6. All doubt consequently is at an end over whether oxen come within the edict; they may certainly not come under the head of "beasts of burden," but they are undoubtedly cattle. 7. There are, however, factors which constitute a disease in the case of human beings which do not do so where animals are involved; suppose, for example, that a mule be castrated; this cannot be

regarded as either a disease or a defect because neither his stamina nor his usability is adversely affected by the fact that he can never be capable of procreation. We have also Caelius writing that it is not all animals which, being castrated, thereby become defective, unless the very fact of their castration diminishes their powers; the mule is, therefore, not defective. He says that Ofilius took the view that a gelding is sound as is also a castrated slave; but if the buyer knew nothing of this but the vendor did, the action on purchase will lie: Ofilius speaks the truth. 8. It has been asked whether a mule, which is such that it cannot be yoked with another, be sound; Pomponius says that it is, since it is often the case that beasts to be linked in joint harness cannot be so linked with one another. 9. He says also that if by temperament or physically the mule be from birth such that it will not bear a common yoke, it is not sound. 10. It is not only on the ground of disease or defect in the beast that return of it may be made; but also if it should not match up with what was declared or promised concerning it, return will be possible as in the case of slaves. 11. Caelius says that a beast is not to be regarded as dressed out for the purpose of sale, if such embellishment occur before the time of sale, say, two days before, but only when it be at the actual time of sale or when it be presented, so bedecked, for inspection as something up for sale. And generally, when the issue is one of the beast's trappings, both the action and the edict postulate "that the animal is led in, so bedecked, for the purpose of sale"; the animal could be so caparisoned for the journey to the place of sale and then to be sold without its trappings. 12. If several beasts be sold, they do not all have to be returned because of the trappings of one of them; so also if one beast, subject to the yoke, prove defective, it does not follow that all the others must be returned. 13. Should there be a yoke of mules, one of which is defective, a diminution of price is to be quantified not merely out of the price of the defective one but out of that of both; for when two are sold for a single price, that price is not to be apportioned, and the issue is how much less the pair was worth at the time of sale and not simply the lower value of the defective one. 14. Now when matched beasts are sold, the edict states that if one be such as to be returnable, both are to be returned; this protects the interests of both purchaser and vendor and the animals are not separated; in like manner, a three- or four-horse team would have to be returned as a whole. But if two pairs of matched mules be sold, of which one mule or pair is defective, one pair only will be returned, the other not. And if they have not yet been matched up but simply four mules are sold at a single price, there will be a return of one mule only, not of the lot. Again, if a stable of horses be sold, the individual horse which is defective is to be returned, not all of them. We say the same of a batch of slaves sold at a single price, unless they cannot be split up, for example, serious or mimic actors,

39 PAUL, *Curule Aediles' Edict, book 1:* or brothers.

40 ULPIAN, *Curule Aediles' Edict, book 2:* For these are not to be separated. The aediles then say: "No one is to have a dog, any wild boar, wolf, bear, panther, lion,

41 PAUL, *Curule Aediles' Edict, book 2:* "and generally any dangerous animal, whether at large or so bound or chained that it shall not inflict harm,

42 ULPIAN, *Curule Aediles' Edict, book 2:* "where there is frequent traffic and it might injure someone or cause damage. The penalty for any contravention of this provision is, if a freeman's death result from it, two hundred solidi; if a freeman be said to have been injured, what a judge regards as right and proper; in all other cases, double the

value of the damage done."

43 PAUL, *Curule Aediles' Edict, book 1:* Many take the view that a goring ox is defective as also unwilling mules; again beasts which take fright at nothing and bolt are held defective. 1. A slave who takes himself off to a friend of his master to seek his intercession is not a fugitive; indeed, even if his thinking be that in the event of his not receiving assistance, he will not return home, he is not yet a fugitive, for flight requires not only the intention but also the act of flight. 2. A slave who leaves his master on the instigation of another is a fugitive, even though he would not have gone, had it not been for the incitement. 3. Suppose that my slave who is serving you in good faith runs away; whether he knows or does not know that he belongs to me, he is a fugitive, unless his intention is to return to me. 4. A slave acts to commit suicide when he seeks death out of wickedness or evil ways or because of some crime that he has committed, but not when he is able no longer to bear his bodily pain. 5. If someone buy a slave and obtain a fourfold penalty by the action for property taken by force, when the slave is seized, and subsequently return the slave, he will have to make over what he received; but if he took proceedings in respect of an insult that he received through the slave, he will not have to give the vendor the award made to him, though the answer would be different if his ground of action was that the slave had been whipped or put to the question. 6. Sometimes it may happen that a slave is to be returned, even though we proceed by the action for assessment, that is, for a diminution; for if the slave should be so worthless that it is not in the purchaser's interests to keep him, for instance, he is mad or has periods of unreason, then, although the action for diminution of the price be brought, it is in the power of the judge to direct return of the slave and recovery of the price. 7. If someone planning to defraud his creditors return a slave whom he would not have returned but for the fraud, the vendor will be accountable to the creditors for the slave. 8. A pledge will remain valid despite the return of the slave in the same way that if the purchaser has alienated him or created a usufruct in him, he will not be properly returnable unless such transactions be redeemed; accordingly, the pledge must be redeemed before the slave is returned. 9. When a slave is bought under a condition, the action for rescission will be brought in vain before the condition has been realized because a purchase which is not yet complete cannot be undone by a judge's decision. Hence, whether it be the action on sale, on purchase, or that for rescission which is brought before that event, proceedings can be brought again after the condition is realized. 10. It can happen that even a straight purchase is in suspense by reason of a condition in law, as when a slave who belongs to one person but is in usufruct to another buys something; for, so long as it is not known with whose money he pays the price, it remains open for whom the acquisition is made; and in consequence, neither master can bring the action for rescission.

44 PAUL, *Curule Aediles' Edict, book 2:* The aediles most properly ruled that a slave should not be treated as an accretion to something of lesser value, so that there might be no fraud on the edict or on the civil law; Pedius explains it on the ground of the dignity of man. The aediles' reasoning applies also to other things; for it would be absurd that an estate should be accessory to a tunic. It is, though, perfectly permissible to make any accretion one wish to a slave who is sold. For it may often be that his *peculium* is worth more than the slave himself and sometimes the *vicarius*, who goes with him, is worth more than the slave actually being sold. 1. This edict proposes an action against the one who has the greatest part in the sale; for slave dealers generally so enter into partnership that whatever they do, they are deemed to do jointly. It seemed right to the aediles that the aedilician actions should lie against any of them who had a major or, anyhow, an equal share in the partnership so that the purchaser would not be obliged to litigate with a number of people, even though the action on purchase lies against each partner to the extent of his share in the partnership; for this class of person is more concerned with making profit or with underhand dealing. 2. Where the action for rescission or diminution of price is brought, a doubt may exist

whether the vendor is also liable for eviction, disease, or flight by the slave, supposing him to have sold someone else's slave; for it could be said that it is no concern of the purchaser that the slave, successfully claimed from him by another, should be sound and not a fugitive. But the purchaser did have an interest in his being sound because of the services he was to perform, and the obligation in respect thereof is not diminished *ex post facto*. Once the slave has been delivered, the stipulation for the purchaser's interest in him becomes operative.

45 GAIUS, *Curule Aediles' Edict, book 1:* The action for rescission may result in one of two condemnations; for the vendor may be obliged to pay now the simple loss incurred, now twofold that sum. For if he does not pay up the price received and any accretions thereto or fails to release anyone under obligation in respect thereof, he will be directed to be condemned for double the price and accessories; but if he should make the relevant restoration or release the guarantor, he will have to pay only the simple loss.

46 POMPONIUS, *Sabinus, book 18:* When you return a slave to me, you do not have to undertake that he is free of theftuous or noxal liability, except in respect of what he may have done at your direction or that of the person to whom you may have alienated him.

47 PAUL, *Sabinus, book 11:* Labeo says that if you should manumit the slave whom you purchased, you will be refused the action for rescission or reduction in his price; as the action on a stipulation for double the price will disappear, so also will redress in respect of anything stated or promised concerning him. 1. But the aedilician actions survive the death of a slave,

48 POMPONIUS, *Sabinus, book 23:* assuming that his death be not attributable to the plaintiff, his household, or his procurator. 1. A hearing is to be granted to one who, while complaining of a defect or disease in the slave, yet wishes to keep him. 2. It will be no detriment to the purchaser that the six months for rescission have elapsed if he bring, within the year, the action for diminution of price. 3. It is right that the aediles' edict should not affect a vendor who sells a fettered slave; this course is infinitely preferable to requiring him to proclaim that the slave has been in chains. 4. It is equally just that a defense should be possible in the aedilician actions that the purchaser was aware of the slave's flight or of his fetters and so forth, and that the vendor should be absolved. 5. The actions of the aediles lie both to and against heirs, with, however, the proviso that acts of the heirs after the death of the principal in respect of which proceedings could lie, may be the subject of complaint. 6. These actions lie not only over slaves but over all animals so that even if I purchase only a usufruct in the slave and so forth, I have the action. 7. When rescission is sought on the ground of soundness, it is legitimate to specify one fault and to give notice that should another become apparent, further proceedings will be brought. 8. It is not our practice to allow rescission in the case of sales where undertakings have been specifically excluded.

49 ULPIAN, *Disputations, book 8:* There is, in no way, any doubt that when land is sold, it may be the object of rescission; suppose that the land be noxious, rescission will be possible. And the benevolent view is that liability for land tax for the period after the land has been returned, will no longer fall upon the purchaser.

50 JULIAN, *From Minicius, book 4:* A slave with varicose veins is not sound.

51 AFRICANUS, *Questions, book 8:* When a slave himself buys another slave who is defective or diseased and his master brings the action for rescission or that on purchase, it is, says [Julian], in every way the state of knowledge of the slave, not of the master to which we look, so that it does not matter whether the slave makes the purchase with his *peculium* or in the name of his master or whether it be certain or not that he buys on his master's instructions; for in such a case, it will accord with good faith that the slave engaged in the purchase was not deceived and, looking at it from the other point of view, his wrong in knowingly making such a purchase should

redound to his master's disadvantage. Again, if a slave buy at his master's behest a slave whom the master knows to be defective, the vendor will incur no liability. 1. Where a procurator makes the purchase and knows that the slave is defective or diseased, there can be no doubt that although he is liable to his principal in the action on mandate or for unsolicited administration, proceedings cannot be taken on the purchase; but if, at the principal's behest, the procurator unwittingly buys a slave whom the principal knows to be defective and then brings the action for rescission, a valid defense against his suit cannot, according to [Julian], be raised on the ground of the principal's knowledge.

52 MARCIAN, *Rules, book 4:* Suppose a slave to have stolen from his master; the master does not have to state this in selling him and it will be no ground for rescission; but if he says that the slave is not a thief, he will be liable on the basis of his statement or promise.

53 JAVOLENUS, *From the Posthumous Works of Labeo, book 1:* Those suffering from a tertian or quartan fever, gout, or epilepsy cannot correctly be said to be sound, even on those days when they are not affected.

54 PAPINIAN, *Replies, book 4:* It is no ground for the action for rescission that a slave, purchased on good terms, runs away, if he had not previously taken flight.

55 PAPINIAN, *Replies, book 12:* Once the six months of business days allowed for the action for rescission are up, a person who was unaware of the latent defect of a fugitive can no longer take proceedings; no concession is to be made on that account to the purchaser whose eyes are now opened.

56 PAUL, *Questions, book 1:* Latinus Largus: I ask whether rescission proceedings are open to a surety of the purchase. My reply is that if the verbal guarantor were accepted in respect of all aspects of the transaction, Marcellus thinks that they are.

57 PAUL, *Questions, book 5:* If a slave buys another slave and his master brings the action for rescission, the vendor will not be condemned to him unless the master makes good all that should be made good in such proceedings; and that in full, not merely to the extent of the slave's *peculium.* Even if the master proceed by the action on purchase, he will recover nothing unless the price has been paid in full. 1. But if a slave or son-in-power makes a sale, rescission proceedings are limited to the *peculium.* The cause of rescission is taken into account in the *peculium,* and it is no occasion for concern that before his return, the slave is not part of the *peculium* (for a slave cannot be part of the *peculium* who still belongs to the purchaser); the actual issue of the rescission, however, will be computed in assessing the *peculium.* Hence, if the slave be bought for ten thousand and is worth five thousand, we say that this too is part of the *peculium,* assuming that the purchasing slave owes his master nothing and that his *peculium* has not been withdrawn. But if the slave's debt to his master be greater than that sum, the result will be that he gives up the slave and obtains nothing.

58 PAUL, *Replies, book 5:* My question is: If a slave runs away from his purchaser and is declared the object of the rescission process, does he have to be returned to the vendor before the latter makes good the value of articles which the slave took with him or not? Paul replied that the vendor will be required not only to repay the price but also to give the value of the goods taken, unless he be prepared to leave the slave in noxal surrender in respect of them. 1. I ask further: If the vendor be unwilling to pay for the goods and return the price, can the slave be returned and an action issue on the stipulation for twofold in respect of the *peculium* or the price of the slave returned? Paul answered that an action on the stipulation will lie in relation to recovery of the price of the slave; the question of the stolen goods has already been dealt with. 2. I bought for double his value a slave who stole from me and ran away; he was soon traced and asked in the presence of upstanding witnesses whether he fled to his vendor; he replied that he had. My question is: Should his answer be given credence? Paul's answer was that if there was no lack of evidence of earlier running away, the slave should be believed.

59 ULPIAN, *Edict, book 74:* When a slave is sold who is such as to be appropriate for return, it is not right that the vendor should claim the price of a returnable thing. 1. If someone buy two slaves for a single price and one be returnable, a defense can be set up by the vendor in the event of his claiming return of the whole price. But if he claim only part of the price, no defense will foil him, unless the case be one of those where a defect in the one slave requires the return of both.

60 PAUL, *Edict, book 69:* When rescission takes place, everything is restored to its original position so that it is as if the sale never took place.

61 ULPIAN, *Edict, book 80:* When action is brought concerning a servitude, the losing vendor will be liable for the amount by which the purchaser would have bought more cheaply, had he been aware of the existence of the servitude.

62 MODESTINUS, *Distinctions, book 8:* It must be said that the edict of the curule aediles does not apply to gifts; for what would the donor promise to return when no price has been asked for? But if the thing, the object of the gift, has been improved, should not the donor be liable for the interest of the improver? Certainly not; the donor should not be punished for his liberality. Hence, in the case of gifts, there is no place for the undertakings which the aediles require in respect of things for sale. Of course, the donor should and does undertake not to be fraudulent, willfully reclaiming what he voluntarily conferred.

63 ULPIAN, *Curule Aediles' Edict, book 1:* It must be realized that this edict applies to all sales, not only those of slaves but also those of anything else. There used to be surprise that no edict was propounded in respect of hire; the explanation is either that the aediles never had jurisdiction over this contract or that circumstances are different in hirings from those in sales.

64 POMPONIUS, *Letters, book 17:* Labeo writes that when you buy a number of slaves at an overall price and you wish to take action in respect of one of them, there will have to be an estimate made between the various slaves in the same way that the quality of the particular field is asssessed when proceedings are taken in respect of eviction from part of the land purchased. 1. He says also that if you sell several slaves for a single price and you guarantee that they are sound and only some of them are unsound, an action can properly be brought for breach of statement or promise in respect of all. 2. In the same portion of his work, he says that a beast of burden may stray or run away but that no action can be brought on the ground that the animal strays or runs away.

65 VENULEIUS, *Actions, book 5:* There are defects which are mental rather than physical, as when the slave is addicted to watching the games or studying works of art or lying or has some similar defect. 1. Cassius sys that whenever a disease is declared serious, it is one which does damage; and that, in turn, means one leaving lasting effects, not one which disappears with the passage of time; moreover, a disease is serious which affects a slave after his birth, serious ones being those leaving lasting damage. 2. One can describe as a slave, both one experienced in servitude and one newly reduced to slavery. However, Caelius says that experience, in this context, is to be assessed not by the length of the servitude but by its nature and ground. For any new slave, bought from a dealer and appointed to some function, thereby joins the ranks of the experienced; new slavery is to be determined not by rawness of mind but by the fact of servitude. It matters not whether the slave understands Latin or not; he can be experienced by reason of being versed in liberal studies.

2

EVICTIONS AND THE STIPULATION FOR DOUBLE THE PRICE

1 ULPIAN, *Sabinus, book 28:* Whether he be evicted wholly or only partially from the thing, the purchaser has redress against his vendor. Now when the eviction is partial but the thing is undivided, his redress is proportional to that part; but if the eviction be from a specific piece of land, redress will be not in relation to a nonspecific portion of the whole estate but on an assessment of the quality of that particular piece. Suppose the eviction to be from the most valuable part of the land or from the least valuable, the quality of the land must be quantified and redress directed accordingly.

2 PAUL, *Sabinus, book 5:* If the vendor does not give the undertaking for double the price and is sued on that ground, he must be condemned, as a defendant, for double the price.

3 PAUL, *Sabinus, book 10:* We know that when a slave is sold, his *peculium* is regularly not included in the sale; now suppose that, in fact, a slave should take with him something from the *peculium.* If the purchaser be sued for theft on that account, he will not have redress against the vendor on the stipulation for double the price on that ground, because the requirement is that the slave be guaranteed nontheftuous and under no noxal liability at the time of sale; and this action arises subsequently to the sale.

4 ULPIAN, *Edict, book 32:* It has been asked whether one selling a slave ought to give a verbal guarantor against eviction, what might commonly be called a second guarantor of the purchaser. The tradition is that this it not essential, unless the parties have specifically provided otherwise. 1. If a tutor should sell on behalf of his *impubes* and eviction follow, Papinian, in the third book of his *Replies,* says that an *actio utilis* lies against the ward whose affairs are administered, adding, however, that this holds good only insofar as the tutor has received clearance on his accounts. Now let us consider the case that the tutor be insolvent: Should condemnation of the ex-ward be for the full amount? I think so for no one does wrong by entering into a contract with a tutor.

5 PAUL, *Edict, book 33:* The vendor of a slave said that his *peculium* would go with him, and then there followed eviction in respect of a *vicarius* of his. Labeo says that the vendor has to restore nothing on that account; either that slave was not part of the principal slave's *peculium* and so was not necessary thereto, or he was, and the purchaser has suffered a wrong at the hands of the judge. It would be different if the vendor said that the *vicarius* went with the slave; for then he would be liable for him as part of the *peculium.*

6 GAIUS, *Provincial Edict, book 10:* When land is sold, the transaction should be in accordance with the custom of the region, and the undertaking in respect of eviction should be adapted accordingly.

7 JULIAN, *Digest, book 13:* One who buys from a *pupillus* a slave, who is his [the ward's] substitute heir, can proceed against the substitute in the action on purchase as also on that arising from the undertaking against eviction, although he could have neither of these actions against the *pupillus* himself.

8 JULIAN, *Digest, book 15:* One selling a slave will have to make good to the purchaser what it is worth to him that the slave belong to the vendor. Accordingly, if he be evicted in respect of the issue of a slave-woman or an inheritance that the slave accepted at his command, he can bring the action on purchase; and just as the vendor is bound to give free and uninterruptible possession of the slave whom he sells, so, equally, he is liable to the purchaser for what the latter could acquire through the slave.

9 PAUL, *Edict, book 76:* Suppose that you sell me a slave belonging to Titius and then Titius dies, leaving me as his heir; Sabinus says that the action for eviction no longer lies because eviction in respect of the slave is no longer possible; but the action on purchase will still be available.

10 CELSUS, *Digest, book 27:* Suppose that someone sell me a right of way, as if he were sole owner, over land which he owns in common and formally create the right; he will be liable to me for eviction, if his co-owner does not join in the grant.

11 PAUL, *Replies, book 6:* Lucius Titius bought lands in Germany beyond the Rhine and paid part of the price. His heir, when sued for the balance, put up the defense that by imperial command, part of the land involved had been sold and part assigned to veterans as their reward. I ask: Does this risk of eviction lie at the vendor's door? Paul replied that the vendor is not affected by evictions occurring subsequently to the sale and so, on the facts stated, the price of the land could be claimed. 1. When the stipulation for double the price or for an indemnity contains the words, "the slave in issue is free of noxal liability," the vendor cannot be sued in respect of wrongs which are the object of public prosecution.

12 SCAEVOLA, *Replies, book 2:* Someone instituted heir as to half sold land and all the heirs took the price; the question is: If there be eviction from that land, are the co-heirs generally liable to the action on purchase? My reply is that if the co-heirs were present and did not dissent, each will be deemed to have sold his own share.

13 PAUL, *Sabinus, book 5:* When there is eviction from part, Proculus rightly held that its quality should be estimated as at the time of sale, not that of eviction;

14 ULPIAN, *Edict, book 18:* and not for half the price;

15 PAUL, *Sabinus, book 5:* but if there has been any accretion by alluvion, the time of such accretion is to be regarded. 1. When there is eviction from a usufruct, an assessment must be made in terms of the quality of the produce. But in the case of eviction from a servitude, the assessment is of the diminished value of the land.

16 POMPONIUS, *Sabinus, book 9:* When there is eviction from what is sold, the action on purchase will lie in respect of its accessories, just as, when there is eviction from things expressly accessory to a purchased estate, their single value must be made good. 1. The stipulation for double the price becomes enforceable when the thing is delivered to the claimant or the purchaser is cast in damages or the person in possession of the thing is absolved when sued by the purchaser. 2. Suppose that we are evicted in the case of a slave for whom we have stipulated double; the question arises whether we can nevertheless sue on the ground of his being a fugitive or unsound. Proculus says that it has also to be considered whether it is relevant that the eviction took place after he had been made over to me or when he had not been; for where he has so been made over, I have an immediate interest in his not being of inferior quality and the action that once accrues to me on the stipulation is not lost by eviction, death, manumission, or flight of the slave nor on any other similar ground; but if he has not yet been made over to me, I am not made the poorer by his being a fugitive, since he is not yet numbered among my assets. Should I stipulate that he be sound and not a wanderer, my interest is based on his present usability, obscure though that may be (for no one currently knows how long I will hold him or whether someone will evict me or the person to whom I may sell or promise him). In the result, the gist of Proculus's opinion is that I recover on the stipulation only my present interest or what would, after the stipulation, have been my interest in his not being a fugitive.

17 ULPIAN, *Sabinus, book 29:* No doubt exists that if a vendor claims ownership of a thing which he himself sold, he can be defeated with the defense of fraud, even though his assertion of ownership is under a different title; for it is scandalous of him to seek to evict his purchaser from what he himself sold. For his part, however, the purchaser has the option of invoking the defense, thus countering the claim and so keeping the thing or of allowing the thing to be taken from him and recovering double the price on the stipulation.

18 PAUL, *Sabinus, book 5:* Even if the defense be not raised or, despite its use, the purchaser be evicted, the vendor can be sued on the stipulation for twofold or in the action on purchase.

19 ULPIAN, *Sabinus, book 29:* Although no stipulation may have been taken, we say the same about the action on purchase. 1. If a freeman serving in good faith should be sold to me by Titius and Titius appoints him heir as being a freeman, whereupon he raises an action against me on the issue of his liberty, he will be personally liable to me on the purchase.

20 POMPONIUS, *Sabinus, book 10:* I pledged my land and later alienated it to you; an undertaking would have to be given that you will not be liable on the pledge, if I later buy the land from you and you give me a *cautio* against eviction, though, even without such undertaking, I could be defeated by the defense of fraud if I were to sue over the existence of the pledge.

21 ULPIAN, *Sabinus, book 29:* If a slave who has been sold should die before eviction occurs, the stipulation is not enforceable, because the eviction is not effected by someone; it is an incident of man's fate; but an action for fraud will lie, if there has been any fraud in the matter. 1. Thus, as Julian elegantly puts it in his forty-third book, the double stipulation is only enforceable if and when the thing is lost in such circumstances that the purchaser's loss is due to the eviction. 2. In consequence, he says that if the purchaser of a slave appoints the vendor as his procurator when a dispute arises over the slave and the vendor, being defeated in the action, is cast in damages, the stipulation for double does not become enforceable because the procurator, being the vendor, will not have the action on mandate to recover the amount of the damages from the purchaser; when the purchaser lacks neither the thing nor his money, the stipulation will not be operative; but if it were the purchaser himself who was unsuccessful and had to pay damages, the stipulation would be enforceable, as Julian himself writes in the same book. It would not be right that the slave who has not been paid for should be taken from one's opponent; the buyer would be entitled to have the slave by virtue of the second purchase, that is, the award of damages, not the first. 3. Still in the same book, Julian writes that if a slave runs away after joinder of issue through the possessor's fault, the possessor will be condemned, but he cannot immediately have recourse against the vendor on the stipulation for double because his not having the slave is due to the latter's running away and not to eviction; of course, he says, when he regains possession of the fugitive, then the stipulation will be enforceable. If the slave ran away, without fault on the possessor's part and then, undertakings being interposed, judgment goes in the possessor's favor, the stipulation will be enforceable only if he returns the apprehended fugitive. Where he elects to pay damages, therefore, apprehension is enough; where an undertaking is given, the stipulation becomes enforceable only when the slave is returned.

22 POMPONIUS, *From Plautius, book 1:* If a tutor pays damages in respect of a thing of his *pupillus* which he buys, not with the money of his *pupillus* but with his own, the stipulation concerning eviction will be enforceable by the *pupillus* against the vendor. 1. A woman buys land and takes sureties against eviction from it and gives it to her husband as dowry; then someone recovers it from her husband by action; the woman can at once proceed against the verbal guarantors of the sale on the ground that her dowry is diminished or nonexistent, if the husband had only the value of the land as dowry.

23 ULPIAN, *Sabinus, book 29:* Even if eviction occurs after the wife's death, recourse

can be had to the stipulation for double because the husband can sue her heirs on the dowry and they can sue on the stipulation.

24 AFRICANUS, *Questions, book 6:* We do not, however, say that it follows that if a prospective bride gives a slave as dowry to his real owner, the stipulation becomes enforceable, even though the woman will equally be without a dowry, because, even though she has no right to have the slave, the truth is that her eviction is not through legal proceedings. But she will have an action on purchase against the vendor.

25 ULPIAN, *Sabinus, book 29:* Should you manumit a slave in respect of whom you have received a stipulation for double the price, you can recover nothing on the stipulation, because there is no eviction preventing your holding a slave whom you have already given up by your own will.

26 PAUL, *Sabinus, book 5:* But the purchaser can sue on the sale on the ground that he does not have a freedman, if the vendor knew that he sold someone else's property. Again, if the purchaser was obliged to manumit him under a *fideicommissum*, he can proceed by the action on purchase.

27 POMPONIUS, *Sabinus, book 11:* The law which we observe is that the vendor is not liable if the purchaser, suing a third party, is defeated by defenses particular to the purchaser himself; but if the defenses are peculiar to the vendor himself, then he is liable. Of course, the purchaser will have neither the action on purchase nor that on a stipulation for double the price or for an indemnity, if the reason for his defeat be a defense grounded in his own conduct.

28 ULPIAN, *Edict, book 80:* But if there be defenses stemming from both of them, vendor and purchaser, the issue will be on which ground the judge decided against the purchaser; and the stipulation will or will not be enforceable accordingly.

29 POMPONIUS, *Sabinus, book 11:* Suppose that I repurchase from the owner a thing which you sold me which belonged to another; the younger Celsus says that Nerva was wrong to say that you can recover the price from me by the action on sale on the ground that I am entitled to hold the thing, because that would not be compatible with good faith and I keep the thing on a ground different from your sale to me. 1. If the party taking a stipulation for double the price be defeated in an action which he brings, having lost possession of the thing, the circumstances being such that, but for losing possession, he could have kept it but, as plaintiff, he must fail, the promisor in the stipulation will either be free of liability by operation of law or be able to invoke the defense of fraud, if the promisee lost possession through his own fault or by his own will. 2. The vendor can be given notice at any time that he should be available for this matter; for there is no time limit set in the stipulation, save that it should not be given at the time of the actual adverse judgment.

30 POMPONIUS, *Sabinus, book 19:* If the victim of a theft by the slave be the heir of the purchaser who obtained a guarantee that the slave was free of theft and noxal liability, he will have the action on the stipulation, as though he had himself been the promisee.

31 ULPIAN, *Sabinus, book 42:* If, when the question is put, someone promise that "the slave is sound and is not a thief or corpse robber" and the like, there are some who think that such stipulation is useless, because either the slave is otherwise in which case the promise is impossible or he is not and then it has no point. However, my view is that a promise that "the slave is sound and is not a thief or corpse robber" has substance; for its essence is the buyer's interest in his being or not being so. Were it added, "reparation will be made if," the stipulation would be the more valid. On any other view, the stipulation required by the aediles would be useless, and no rational person would accept that.

32 ULPIAN, *Sabinus, book 46:* Since it is said that whenever several items are included in a stipulation, there are really several stipulations, we have to consider whether the same applies to the stipulation for double the price, when the purchaser stipulates that the slave "is not a fugitive or a wanderer" and the other things promised under the edict of the curule aediles: Do we have one stipulation or several? Reason indicates that they are several. 1. There, therefore, applies what Julian writes in the fifteenth book of his *Digest.* He says that one who has brought the action for diminution of price because of the slave's running away, then sues because he is diseased; it must be ensured, he says, that the purchaser does not make a profit and recover twice for the same defect. Let us suppose the slave bought for ten when he could have been bought for two less, if the purchaser had only known him to be a fugitive; the purchaser recovers that on the ground of his flight; soon after, he discovers that the slave is diseased and, had he known of this fact, again he could have bought for two less. Had he sued on both grounds at once, he would have recovered four because he would have paid no more than six for one who is a fugitive and unsound. Along these lines, it is possible to bring action on the stipulation more than once; for action is not on one stipulation only but on several.

33 ULPIAN, *Sabinus, book 51:* If I buy a slave and then sell him and am condemned to my purchaser because I had no title to transfer the slave from whom he has now been evicted, my own stipulation for double becomes enforceable.

34 POMPONIUS, *Sabinus, book 27:* If you buy a slave with a provision against prostitution and that if the slave be prostituted, he or she will be free, then, should he or she have obtained his or her liberty through your contravention of the term of the contract, you will be regarded as rather manumitting him or her, and so you will have no recourse against the vendor. 1. If I be sued in the action to divide common property and the slave be awarded to my opponent as being shown to be common property, I will have an action on the stipulation for double the price, because it does not matter what is the nature of the action in consequence of which I am not entitled to hold him. 2. The stipulation for double the price is operative not only where someone sues the purchaser for ownership and so recovers from him but also if he proceeds by the *actio Serviana.*

35 PAUL, *Curule Aediles' Edict, book 2:* A purchaser is regarded as evicted by a creditor, when his title to hold the thing is to all intents at an end. Hence, if he be evicted by the *actio Serviana,* the stipulation is enforceable; but since he can keep the slave, if his vendor, the debtor, pays what he owes, the vendor, if sued after he has discharged his debt, can invoke the defense of fraud.

36 PAUL, *Edict, book 29:* When a ship or a house is sold, the individual planks or bricks are not regarded as objects of the purchase, and so the vendor will not be liable for eviction as though there has been eviction from part.

37 ULPIAN, *Edict, book 32:* The purchaser should receive the stipulation for double the price from the vendor, subject to contrary agreement; but he is not entitled to security, unless that be specifically contracted for; he is entitled only to the promise. 1. Now when we say that twofold should be promised, this does not mean that it applies generally but only to things of value, a pearl, for instance, valuable ornaments, a silk garment, or anything else of no small worth. The vendor of a slave is also required to give the undertaking in respect of a slave under the edict of the curule aediles. 2. Should the purchaser in error take a stipulation for indemnity instead of for double the price, Neratius says that in the event of eviction, he can recover by the action on purchase the amount by which he understipulated, provided that the purchaser does everything which comes within the stipulation; if that be not the case, he will recover in the action on purchase only the vendor's undertaking for the amount not brought into the original stipulation.

38 ULPIAN, *Disputations, book 2:* Where a creditor sells a pledge, it may be considered whether he is liable on the purchase, if there be eviction from the thing, to make

over to him the action which he has against the debtor; for he has the counteraction on the pledge. The better view is that he must make it available. Who would not regard it as proper that the purchaser should at least recover what will not be at the expense of the creditor?

39 JULIAN, *Digest, book 57:* One below the age of twenty-five sold land to Titius, and Titius sold it to Seius; the *minor* now claims that he was circumvented in the sale and asks proceedings not only against Titius but also against Seius. Seius asks before the praetor that he be granted a valid stipulation against Titius; I think that it should be allowed. My answer was that Seius's claim has merit; for if he should lose the land through the praetor's investigation, it is right that he should be recompensed for the eviction by the same praetor. 1. Suppose that your slave should buy a slave whom he sells to Titius, promising double the price in the event of eviction, while you have stipulated similarly from the vendor of the slave. If Titius were to claim the slave and be unsuccessful because your slave could not give title to the slave if he transferred him without your consent, the *actio Publiciana* remains, and so the stipulation for double will not become enforceable; hence also, your own vendor can defeat you with the defense of fraud if you sue him on his undertaking. But it is different if a slave should buy a slave and take a stipulation for double and later sell him and the purchaser were evicted from him; his owner will have action in full against the seller, but the purchaser will have action against the owner only to the extent of his *peculium.* The purchaser must, however, give notice of the eviction to the slave, not to his master; for then, the eviction taking place, he can effectively sue to the extent of the *peculium*; should the slave now be dead, however, he can give notice to the master. 2. You buy land, as to two thirds from me and, as to the remaining third, from Titius and then someone claims half the estate from you; if that half is wholly from the two thirds you had from me, Titius will incur no liability; but if the claim be for the third received from Titius and a sixth of what you had from me, Titius will be liable to you for a third and I for a sixth in respect of the eviction. 3. A head of household knowingly sold his son-in-power to an unsuspecting purchaser; the question arose: Was he liable for eviction? My answer was that one who sells a freeman as a slave, whatever the state of his knowledge, is liable for eviction; hence, a head of household who sells his son as if he were a slave is so liable. 4. Someone who delivers a *statuliber* is liable without limit of time in respect of evictions unless he disclosed that he was a *statuliber.* 5. Someone sells and makes over a slave, stating that Seius has a usufruct in him, when in fact Sempronius is the beneficiary; when Sempronius claims his usufruct, the vendor will be as liable as if he had said at the time of sale that he was not liable to Seius for any usufruct. But if Seius really had a usufruct so left to him, however, that when it ceased to benefit Seius, it would pass to Sempronius, the vendor will be liable when Sempronius claims his usufruct, but if Seius should sue, he would properly be absolved.

40 JULIAN, *Digest, book 58:* Should the purchaser, who took sureties from me in respect of eviction, bequeath the land away from me who am now his heir, the verbal guarantors are released forthwith, and even if the legatee be evicted, no action lies against the guarantors.

41 PAUL, *Curule Aediles' Edict, book 2:* If I become the heir of the person to whom I sold a slave in respect of whom, when the purchaser put the question to me, I promised double the price, the stipulation will in no way become enforceable if the slave be evicted; for I was not evicted when I sold him; nor was the person to whom I made the promise; because I can hardly be said to be obliged to pay myself double. 1. Again, if the purchaser become heir of the slave's owner, the stipulation for double the price will not be enforceable, because he cannot be evicted and cannot be deemed to evict himself. In cases like that, therefore, the action on purchase must be brought. 2. Suppose that someone buys land and takes sureties against eviction; he sells the land and then becomes heir to his purchaser or the purchaser becomes his heir; the question is: Can proceedings be brought against the verbal guarantors if the land be evicted? I

think that in either case, the guarantors are liable. Even when a debtor becomes heir to his creditor, a kind of accounting occurs between the heir and the inheritance, and the debtor is regarded as getting a larger inheritance, as though he has paid off thereto the money he owed and thereby his own assets are reduced. Conversely, when a creditor becomes heir to his debtor, he is deemed to be heir to a smaller inheritance, as though the estate itself pays him off. Accordingly, if the person giving sureties against eviction becomes his purchaser's heir or the purchaser heir of the vendor, the verbal guarantors will still be liable. And if the inheritance of both vendor and purchaser should fall to the same person, he too can sue the guarantors.

42 PAUL, *Edict, book 53:* If a pregnant slave-woman be sold and delivered, the vendor cannot be sued on the ground of eviction if her eventual child be evicted, because the child was not an object of the sale.

43 JULIAN, *Digest, book 58:* If a purchaser buys a cow and her calf, born after the purchase, is evicted, he cannot sue on the stipulation for double the price; for neither the cow nor her use and her produce is evicted. When we describe the calf as the fruit or produce of the cow, we are talking in factual terms, not of a legal right; in like manner, we correctly call wine-making grapes and crops the fruits of land; but there is no question of their properly being designated a usufruct.

44 ALFENUS, *Digest, Epitomized by Paul, book 2:* He replied that a little boat is not part of the ship and is not adjoined to it for it is itself a sort of small ship; but all the fittings of the ship (for example, rudders, the mast, yards, and sails) are like limbs of the vessel.

45 ALFENUS, *Digest, Epitomized by Paul, book 4:* One who transferred an estate of a hundred acres indicated to the purchaser boundaries far exceeding that extent. If there be eviction from any part of those confines, he says, the vendor will be liable to the purchaser according to the quality of the land evicted, even though what remains does comprise a hundred acres.

46 AFRICANUS, *Questions, book 6:* You sold me a property in which Attius had a usufruct, and you did not mention Attius's usufruct; I then transferred the land to Maevius, reserving myself a usufruct. Julian said that if Attius should undergo a change of his civil status, the usufruct would revert, not to me, but to the owner of the land; for a usufruct could not be validly created at a time when it had already been conveyed elsewhere, but that I would be able to sue the vendor in respect of eviction, because it is only right that my position should be as it would have been if another had not had a usufruct at the relevant time. 1. If you grant me a right of way over someone else's land, [Julian] says that you will be liable for eviction; for wherever the grant would have been valid if the land had belonged to the grantor, then liability for eviction follows, if the land, in fact, belongs to a third party. 2. When I sold you Stichus, I said that he was a *statuliber*, having been manumitted under the condition, "if the ship arrives from Asia," when the true condition was, "if Titius becomes consul." The question is this: If the ship first arrives from Asia and, subsequently, Titius becomes consul, so that Stichus attains his freedom, am I liable on the ground of eviction? [Julian's] answer was: "No." For the purchaser acts fraudulently in that the condition which he discharged on the ground of eviction was realized first. 3. Again, if I said that a slave was to be free after two years, when the true period was one year, and he became free after two years or I said that he was to become free on paying fifteen, when the sum was really ten, the better view is that in these cases, too, there would be no eviction liability.

47 AFRICANUS, *Questions, book 8:* If I buy two slaves from you at five apiece and one of them be evicted, there can be no doubt that I can properly bring the action on pur-

chase on that account, even though the other be worth ten; and it is irrelevant whether I bought them separately or together.

48 NERATIUS, *Parchments, book 6:* When land has been purchased as wholly free from encumbrances and the purchaser has recovered something from the vendor by reason of eviction in respect of some servitude and then there is eviction from the whole estate, liability, this time, will be for the balance of double the price. To adopt any other principle would mean that if eviction took place in respect of first some servitudes and then of ownership, the purchaser would recover more than double what he paid.

49 GAIUS, *Provincial Edict, book 7:* If a usufruct be claimed from the purchaser, he is to give notice to the vendor as though he were one from whom part of the property is claimed.

50 ULPIAN, *Edict, book 25:* No one has ever suggested that when, executing a decision, the praetor's minions sell pledges by extraordinary process, an action will lie against them, if the thing be evicted; but if they deliberately dispose of the thing for a price less than its worth, the owner of the thing will have the action for fraud against them.

51 ULPIAN, *Edict, book 80:* If judgment should go against the purchaser because of the judge's ignorance or error, we do not accept that his vendor-guarantor is to bear the loss on that account; how can it matter that the thing is lost through the judge's venality or his stupidity? The wrong done to the purchaser is not to be visited upon the vendor-guarantor. 1. Suppose Titius to sell Stichus who is directed to become free on the death of Titius; Titius dies and the slave duly attains his freedom; is any stipulation concerning the eviction of Stichus, which may have been interposed, to become enforceable? Julian says that it is enforceable; for although Titius himself, in such circumstances, could not have been given notice of the eviction, his heir can. 2. If a man sell land and then be buried in it by his heir with the consent of the purchaser, the action for eviction has no place; for in such a case, the purchaser will lose his ownership. 3. It is, however, no occasion for surprise that when there be eviction from a slave, the heir is liable, although the deceased would not have been under a similar obligation; for there are other cases in which the obligation of or to the heir is greater than in the case of the deceased. Put the case that the slave become someone's heir after the death of his purchaser and that he be directed by the purchaser's heir to accept the inheritance; the value of the inheritance is due to the heir in the action on purchase, though the deceased purchaser could only have required that the slave be delivered to him. 4. If there be several who are fully liable to me in respect of eviction, Labeo says that a defense will defeat me if, having sued one in respect of eviction, I then take proceedings against the others.

52 ULPIAN, *Edict, book 81:* It should be known that for its enforceability, it does not matter whether the stipulation for double the price was invoked by reason of sale or on any other ground.

53 PAUL, *Edict, book 77:* When land has been transferred and part of it is evicted, assuming that it was sold at so much per acre, the vendor's liability is assessed, not according to the quality of the land but according to the individual prices of what is in the part evicted—and that, even though the more desirable extents be those evicted. 1. If a purchaser, when he could, did not give notice to his vendor-guarantor and in consequence was evicted, the very fact of his lack of awareness is attributed to his fault, and he, therefore, cannot sue on the stipulation.

54 GAIUS, *Provincial Edict, book 28:* One who sells someone else's thing ceases to be liable for eviction after the purchaser's acquisition of ownership by long-term prescription or by usucapion. 1. If an heir sell a *statuliber*, directed to be free on giving a certain amount of money, and declare the sum to be greater than it is, he will be liable to the action on purchase, if the condition be such that the slave would pass to the purchaser, that is, that the sum is to be paid to the heir; if the sum were to be paid to a

third party, then, even though the correct amount was stated, the heir would be liable for eviction to the purchaser if he did not state that the sum was due to another.

55 ULPIAN, *Curule Aediles' Edict, book 2:* If judgment goes against a purchaser because he did not appear, the stipulation is not enforceable; for he is deemed to have lost because of his nonappearance rather than because he had a bad case. But what if, though the purchaser against whom judgment was given was not present, someone else was there and conducted the case? What do we say? It could be, for instance, that issue was joined with a *pupillus* with the *auctoritas* of his tutor and, the *pupillus* being absent, the tutor fought the case and judgment went against him; are we not to say that the stipulation is enforceable? After all, the case has been fought. It is enough that it was fought by one with a right to fight it. 1. Notice of a claim against him should be given by the purchaser to the vendor, if he be present; but if he be absent or, though present, prevent notice being given to him, the stipulation becomes enforceable.

56 PAUL, *Curule Aediles' Edict, book 2:* If it be stated at the time of sale that a stipulation for once, triple, or fourfold the price is to be entered into, an action on purchase will lie at any time. However, contrary to popular belief, one who promises double the price is not required also to give security; a simple promise suffices unless the parties agree otherwise. 1. If I agree to go to arbitration and the award is against me, no action for eviction will be granted me against the vendor; for I acted without any compulsion upon me. 2. In a stipulation for double the price on the sale of a slave, it is necessary to provide also against eviction from part of the slave, because eviction from part cannot be regarded as eviction from the whole slave. 3. If the purchaser is able to become owner by usucapion but does not, that is deemed due to his own fault; hence, the vendor will not be liable in the event of the slave's eviction. 4. If notice of an eviction claim be given to the procurator of the person who promised in respect of eviction, that person being present and aware of what is going on, the promisor himself is nonetheless liable. 5. So also is one who takes steps to prevent notice being given to himself. 6. Indeed, even if the vendor did nothing but the purchaser did not know his whereabouts, the stipulation is enforceable all the same. 7. Trebatius says that the lenient view has been accepted that if the tutor cannot be found, notice may be given to a *pupillus* even without his tutor's *auctoritas.*

57 GAIUS, *Curule Aediles' Edict, book 2:* The purchaser's possession continues even if the person successful against him in eviction proceedings should, before the thing is taken or led away, die without a successor, the circumstances being such that there is no occasion for his estate to go to the imperial treasury or to be sold by his creditors. In such a case, the purchaser will have no action on the stipulation, since his holding is undisturbed. 1. This being so, we must consider whether it must equally be held that no action will lie on the stipulation, if the successful claimant makes a gift or legacy of the thing to the purchaser, before taking or leading it away. For the rest, once liability on the stipulation is incurred, it cannot be released.

58 JAVOLENUS, *From Plautius, book 1:* An heir handed over a slave under a legacy which mentioned no specific slave and guaranteed against fraud; the slave was later evicted. The legatee can have an action on the will against the heir, although the latter was unaware that the slave did not belong to the testator.

59 POMPONIUS, *From Plautius, book 2:* If a thing that I bought from Titius be bequeathed by legacy charged on me, the legatee, when sued by the owner of the thing, cannot give notice to my vendor, unless there be ceding of action or he chance to have a hypothec.

60 JAVOLENUS, *From Plautius, book 2:* If it be not stated at the time of sale what

liability the vendor is to incur in respect of eviction, he will be liable on eviction for no more than the price and, by virtue of the nature of the action on purchase, the purchaser's damages.

61 MARCELLUS, *Digest, book 8:* It is agreed that if I buy something from you and sell it to Titius and ask you to deliver to Titius, you will be liable to me for eviction, just as if I had received the thing from you and delivered it myself.

62 CELSUS, *Digest, book 27:* If I sell you a thing already in your hands, it is established that I will be liable in the event of your eviction because it is regarded as having been delivered to you. 1. Should my vendor have several heirs, there is a single liability for eviction of which notice is to be given to all, all being liable to defend the proceedings; now if the rest should deliberately not appear but one of them defends the action, he will, by reason of the notice and their aforementioned absence, be successful or unsuccessful for all of them and I could validly, as purchaser, proceed against the others, because they have been defeated on the issue of eviction. 2. If you sell me, who do not know the position, land in which Titius has a usufruct for life, reserving the usufruct to yourself, and Titius, having experienced a change of status, bring an action for his right to use and enjoy the land, I will have an action against you on the stipulation in respect of eviction, because, if what you told me at the sale had been true, I would properly have denied that Titius had a usufruct.

63 MODESTINUS, *Replies, book 5:* Herennius Modestinus made answer that it is no objection to one bringing the action on purchase that no notice concerning eviction was given, if the requirement of notice had been waived by agreement. 1. Geia bought the land of Seius from Lucius Titius, and when an issue was raised in the name of the imperial treasury, she called upon her warrantor; but, eviction ensuing, the land was taken and adjudicated to the treasury, the vendor being present; the question is whether the purchaser, not having appealed, could sue her vendor. The answer of Herennius Modestinus was that whether it belonged to someone else or was under obligation at the time of sale and thus was evicted, no argument had been advanced why the purchaser should not have an action against her vendor. 2. Herennius Modestinus replied that if the purchaser appealed and through his own fault lost a good case on a demurrer, there would be no recourse against his warrantor.

64 PAPINIAN, *Questions, book 7:* A thousand acres were transferred and the river's flood removed two hundred of them. Subsequently, if two hundred be evicted without specification, liability on the stipulation for double the price will be in respect of one fifth, not one quarter of the estate; for what the river took was the purchaser's loss, not that of the vendor. If all the land, reduced in size by the river, should be evicted, legal liability for eviction is not diminished, any more than if the land or slave transferred were reduced in value through negligence. Conversely, the extent of liability for eviction is not increased, if the thing has been improved. 1. But if, while the full measure of land transferred remains intact, two hundred acres are added by alluvion and then there follows eviction of a nonspecific two hundred, there will be liability for a fifth as though two hundred of the original thousand acres delivered have been evicted; for the vendor gives no guarantee in respect of alluvion. 2. Suppose that when one thousand acres have been transferred, two hundred disappear but then, through alluvion, two hundred are added to another part of the estate and, subsequently, there follows eviction from a nonspecific fifth part of the estate; the question was put to me: For what proportion is the vendor-guarantor liable? I said that following from what appears above, there is eviction liability for neither a fifth nor a fourth; but he will be liable as if one hundred and sixty had been evicted of the eight hundred surviving acres of the original thousand; for the remaining forty, which disappeared from the original estate, are to be deemed proportionally part of a new tract. 3. But when some specific part of an estate is evicted, then, although a definite number of acres was transferred, eviction liability is determined not by the extent but by the quality of the land evicted. 4. A person who is owner in common of a single acre, transfers it; opin-

ion is unanimous that he transfers not the whole but his half acre in the same way as if he had transferred a specific site, plot, or the like.

65 PAPINIAN, *Questions, book 8:* Heirs sold a thing, part of the inheritance, which was subject to a pledge, and gave undertakings against eviction for their respective shares of the inheritance; one redeemed the pledge in respect of his share and then the creditor evicted the pledge; the question was: Could both heirs be sued on the eviction? It was decided that they could, because the pledge was unitary in its ground. It did not commend itself that by means of a defense of fraud, actions should be ceded to the one who paid the creditor, because the two were not alleged to be separately responsible therefor, though the action for dividing an inheritance will be available. How could it matter whether one of the heirs freed the pledge completely or only in respect of his share? the negligence of the one heir should not be harmful to the other.

66 PAPINIAN, *Questions, book 28:* If the vendor advised the purchaser that there was an *actio Publiciana* that he could bring or the action provided for public land held on a long lease and the purchaser refrains from proceedings, his deliberate failure to act will go against him and the stipulation will not be enforceable. The case is not the same with the *actio Serviana;* for though it is an action *in rem,* its aim is simply to claim possession; and if the vendor receives his money, it disappears; hence, the purchaser cannot sue on his own account. 1. If someone who was away on state service should claim the land, the possessor will have an *actio utilis* in respect of eviction. Similarly, if a private citizen claim from a soldier, equity again requires that the purchaser should be given an action for eviction. 2. If a second purchaser should appoint his vendor, the first purchaser, as his procurator in proceedings over a slave and, the slave not being returned, condemnation follow, whatever the procurator pays up by reason of the judgment, he pays, as it were, in his own cause and cannot recover on the stipulation; but because the loss consequent upon eviction falls on the second purchaser who can recover nothing by the action on mandate, he should be able to proceed effectively for an award of damages on the sale to him. 3. A division has been made between co-heirs and, one of them being absent, a procurator acts for him, and his principal ratifies his administration. If lands should be evicted, there will be granted against the principal the action which lies for the administration of the affairs of an absent person so that the plaintiff may recover his damages; obviously, on the basis that the value assessed at the time of the division will be reduced or increased according as the land has appreciated or deteriorated.

67 PAPINIAN, *Replies, book 10:* If, when the true owner has been awarded judgment and has taken away the slave, the vendor later offers the same slave to the purchaser, so that he does not have to pay the purchaser's damages, that is not a good defense.

68 PAPINIAN, *Replies, book 11:* When a pledge is sold with the provision that the creditor will not be liable in the event of eviction, then, although the purchaser, while not paying the price, has given security for it, he will have no defense, if eviction follows, whereby to avoid paying the price. 1. A creditor who opts to proceed for his debtor's debt by *delegatio,* instead of pressing for the money, will have no action against the person he has released, if the pledges accepted by the previous creditor be evicted.

69 SCAEVOLA, *Questions, book 2:* A person, who, in selling a supposed slave, reserves the issue of the man's liberty, will not be liable for eviction, whether the man was already free at the time of delivery or was to attain freedom on the implementation of a condition imposed by a testamentary grant of freedom to him. 1. One who, in delivering him, states a man to be a *statuliber* is deemed to reserve only that form of liberty which can eventuate on the future realization of a condition in a will already past; hence, if freedom forthwith be granted in the will and the vendor declare the man a *statuliber,* he will be liable for eviction. 2. Again, one who delivers a *statuliber,* specifying a particular condition of his freedom, is held to put his own position at risk, because he is deemed to reserve only that particular condition and not the whole issue

of the pending liberty. Suppose him to say that the object of the sale is to give ten and will then become free after a year, when the actual grant of liberty is with the proviso, "let Stichus be free after a year," he will be liable for eviction. 3. What, then, if the vendor should say that a *statuliber*, in fact required to pay ten, has to pay twenty? Surely, he is guilty of falsehood over the condition. It is certainly true that he has falsely stated the condition, and there were accordingly those who thought that he should be liable on the stipulation against eviction; but the authority of Servius prevailed; and he was of opinion that in this case, it is the action on purchase which lies, doubtless on the ground that the vendor, in saying that twenty are to be given, is reserving the condition as such, which is one of giving. 4. The will has directed that a slave shall be free on rendering his accounts; the heir delivers him saying that he has to give a hundred for his freedom. If there is nothing more that the slave has to give and, in consequence, since the inheritance has been accepted, he becomes free, the heir becomes liable for eviction, because a freeman has been delivered as though he were a *statuliber*. If a residue of at least a hundred remain, the heir can be regarded as not having stated an untruth since, being directed to render accounts, the slave is deemed to be directed to give a sum of money derived from the residue. It follows from this that if there be less than a hundred in the residue, say, fifty, the slave will gain his freedom on giving those fifty, and the action on purchase will lie in respect of the remaining fifty. 5. If, in selling a slave, the vendor should say generally that he is a *statuliber* but conceal the condition of freedom, he will be liable to the action on purchase, if the purchaser be unaware of the nature of the condition. Thus, it is made clear that a vendor, who declares the slave a *statuliber* without specifying the condition of freedom, will not be liable for eviction, if, the condition being satisfied, the slave gains his freedom, but that he will be liable to an action on the purchase when, knowing the nature of the condition, he does not reveal it; in the same way, a person transferring land who, knowing it to be subject to a definite servitude, says generally, "rights of way existing, whatever they be, are expressly reserved" certainly escapes liability for eviction, but is liable to the action on purchase, because he deceives the purchaser. 6. Where land is sold without a declaration of its extent, a proportion will be deducted from the price, the total amount of which can be computed from the total number of acres stated.

70 PAUL, *Questions, book 5:* Where there has been eviction, the action on purchase lies, not to recover the price as such but for the loss to the purchaser; if, therefore, the thing has depreciated in value, that loss will fall on the purchaser.

71 PAUL, *Questions, book 16:* A head of household gave land by way of dowry in his daughter's behalf; if the land should be evicted, there is doubt—and not without good reason—whether purchase or eviction liability ensues, the ground being that the head of household has suffered loss; for, the dowry being that of the woman, it cannot be said that it belongs to the head of household, and he is not required to confer on her brothers the dowry which he himself created, so long as the marriage continues. Let us see, though, whether, even in this case, it is more plausible to say that eviction liability does in fact result; for it is in the father's interest that his daughter should have a dowry and that he should have an expectancy of its recovery, so long as she is in his power. But, should she be emancipated, it could hardly be argued that the eviction stipulation would become enforceable, because there is only one contingency in which the dowry could return to him (namely, that the daughter be still in his power). But could he not at least sue on the ground that, the daughter dying while still married, he could recover the dowry, if the land had not been evicted? Should we not hold that in such a case, since he has an interest in his daughter being dowered, he can sue the promisor forthwith? A father's affection inclines one to that view.

72 CALLISTRATUS, *Questions, book 2:* When several pieces of land are sold with a single instrument of purchase being expressly prepared, comprising each of them, the case is not one of each piece being part of another, that is, the total extent, but one of several pieces being sold together. And just as, when a man sells several slaves with only a single document of purchase, the action for eviction lies in respect of each

individual slave, as it would in respect of other things sold together in one transaction, a single instrument of purchase being drawn up, there will be as many actions for eviction as there are individual items comprised in the purchase. Hence, in the case first put, the purchaser will in no way be precluded from suing the vendor, when one piece of land is evicted on the ground that a deal involving several pieces of land is comprised in a single document of purchase.

73 PAUL, *Replies, book 7:* Seia gave in dowry the Maevian, Seian, and other estates; her husband, Titius, possessed these lands without dispute during Seia's life; but after Seia's death, her heiress, Sempronia, instituted proceedings on the issue of the ownership of the property; my question is: Can Sempronia, being Seia's heiress, lawfully raise such an action? Paul's reply was this: Sempronia, suing in her own right and not as Seia's heiress, can raise an issue over title to the land, but in the event of eviction from that land, Sempronia, as heiress of Seia, can be sued or, at any rate, be resisted with the defense of fraud.

74 HERMOGENIAN, *Epitome of Law, book 2:* Should it have been agreed that in the event of eviction, more or less than the amount of the price shall be paid, that agreement is to be honored. 1. Suppose that something seized at the judge's discretion, as a pledge in respect of a judgment, be officially sold and subsequently evicted; an action on purchase will lie against the judgment debtor released by payment of the price—not for the purchaser's loss in sum, but only to the extent of the price paid and interest thereon and taking into account the assessed value of the thing's produce; assuming that there be no liability to restore this to the person effecting the eviction. 2. The issue being raised, the vendor can be sued, not initially to restore the price, but to defend the proceedings. 3. One who sells a debt as it stands is required only to be liable that it does exist, not that anything can be claimed, and that he is not himself fraudulent.

75 VENULEIUS, *Stipulations, book 16:* Where praedial servitudes are concerned, which tacitly pass with the land and which are successfully claimed by a third party, Quintus Mucius and Sabinus hold that the vendor of the land is not liable for eviction; in their view, no one will be liable for eviction in respect of a burden passing tacitly with the land unless the land has been transferred as wholly free from encumbrances; for in such a case, the vendor is liable for there being any servitude at all. But if the purchaser should claim a right of way or of driving cattle, the vendor will be under no liability, unless he specifically stated that such right would go with the land; should he so state, he will be liable. It is a correct opinion of Quintus Mucius that one who transfers land as wholly free from encumbrance must give unfettered land but is liable for no servitudes being due to the land, unless he specifically said that they would accrue.

76 VENULEIUS, *Stipulations, book 17:* If you deliver to me a thing belonging to someone else and I am able to retain and hold it as being abandoned, your liability for my security of tenure, that is, the action for eviction, disappears; on that, there is general agreement.

3

THE DEFENSE THAT THE THING HAS BEEN SOLD AND DELIVERED

1 ULPIAN, *Edict, book 76:* Marcellus writes that if you sell a third person's land and then claim it as your own, you will correctly be defeated by this defense. 1. The same applies, even if the true owner of the land become heir to the vendor. 2. If someone, acting on my mandate, sell a thing belonging to me, I shall be defeated by this defense in the event of my seeking to assert title to it after the sale; unless it be proven that my mandate was that the thing should not be delivered until the full price had been paid. 3. Celsus says that if my mandatory has sold a thing of mine at a

price lower than that which I specified, the thing is deemed not to have been alienated; and so if I claim the thing as mine, this defense will not lie against me; this is correct. 4. Suppose that a slave buys goods with his *peculium* and then, before he has acquired ownership of the thing, his owner bids him, in his will, to be free and bequeaths to him his *peculium*, and now the vendor claims the wares from the slave; a defense *in factum* will lie to the defendant, because he was a slave at the actual time of the contract. 5. Put the case that a person buys something which is not delivered to him but of which he acquires possession without any flaw in the manner of his acquisition; he will have this defense against the vendor unless the latter can show good cause why he should assert title to the thing; for even if the vendor did himself deliver possession but has good ground for asserting his title, he will have an answer to the defendant's defense.

2 POMPONIUS, *From Plautius, book 2:* Let us suppose that you buy land from Titius which, in fact, belongs to Sempronius and that it is transferred to you; then, the price having been paid, Titius becomes heir to Sempronius and sells and transfers the same land to Maevius. Julian says that it is you who are to have the protection of the law, because, even if Titius himself were claiming the land from you, he would be defeated by this defense and if he were in possession of the land, you could claim it from him by the Publician action.

3 HERMOGENIAN, *Epitome of Law, book 6:* The defense that the thing has been sold and delivered not only lies to the actual transferee but also avails his successors and a subsequent purchaser, even where there has yet been no delivery to him: for the first purchaser has an interest in the second one not being evicted. 1. By parity of reasoning, the defense is also effective against the vendor's successors whether they be universal successors or successors only in respect of that particular thing.

BOOK TWENTY-TWO

1

INTEREST, FRUITS, INCIDENTALS, ACCESSIONS, AND DELAY

1 PAPINIAN, *Questions, book 2:* In an action of good faith, the rate of interest is fixed at the judge's behest according to the custom of the place of contracting, so long as statute is respected. 1. Even in the absence of delay, interest is due from a partner liable for taking partnership money or converting it to his own use. 2. But a judge in an action of good faith cannot rightly require a written promise that if there is delay in satisfying the judgment, interest will be paid for the future, since it is in the plaintiff's power to execute the judgment. PAUL notes: What business of the judge is the period after judgment? 3. PAPINIAN: In favor of *pupilli* a broader rule is accepted as regards accountability for tutelage. Today, in case of trial, no one doubts that interest is due to the date of judgment, and, if the account is settled without trial, the date of settlement. Of course, if the tutor voluntarily approaches a *pupillus* who does not wish to sue on tutelage and offers the amount due and deposits it under seal, he is not liable for interest from that date.

2 PAPINIAN, *Questions, book 6:* It is commonly agreed that even in an action *in personam*, incidentals are due after joinder of issue. The reason given is that the thing must be handed over as if at the time of suit, and hence, fruits gathered and offspring born thereafter are included.

3 PAPINIAN, *Questions, book 20:* In a claim for a *fideicommissum*, when the heir delayed after judgment, the Emperor Marcus Antoninus ordered that after the statutory period allowed to judgment debtors, the fideicommissary should receive accretions up to judgment. This decision applies if there was no delay before judgment, though in practice there is not often a trial without preceding delay. An example might be if the heir relies on the *lex Falcidia*. But if the heir was guilty of delay before the trial, he is bound to hand over fruits from the time of delay. Why then, having lost the case, is he free from liability for fruits for the statutory period, since that interval is meant to give the judgment debtor time, not profit? 1. In actions which are neither discretionary nor based on good faith, the plaintiff is entitled to incidentals from joinder of issue to judgment. The period after judgment is not included in the judgment for fruits. 2. It sometimes happens that fruits of an inheritance or interest on a loan are due though not specifically bequeathed. An example is if someone is asked to restore whatever is left at his death to Titius. Just as anything used up in good faith,

which is in proportion to the reduction in the rest of the estate, does not form part of the *fideicommissum*, so any extant fruits must be handed over, as the testator intended. 3. Pollidius was made heir by a woman relative and asked to restore to the woman's daughter at a certain age whatever he obtained from the estate. The mother explained in her will that she did this in order to entrust her daughter's affairs to relatives rather than to tutors. She provided that Pollidius should retain certain land. I persuaded the praetorian prefects that the fruits taken by Pollidius in good faith from the estate of the deceased should be handed over, either because only the land was prelegated to him or because the mother had chosen the remedy of *fideicommissum* to avoid the dangers of tutelage. 4. If there is delay in a *fideicommissum* of gold and silver objects, must interest be given? If he leaves the materials to be sold and converted into money with which to pay *fidecommissa* or maintenance, the answer is that the delay should not go unpunished. But if he made the provision so that the vessels themselves could be used, it is shameful to demand interest. Hence, it will not be exacted.

4 PAPINIAN, *Questions, book 27:* If you stipulate for "transfer of a thing and delivery of vacant possession," reason requires that in an action on a stipulation for an uncertain amount you will, in view of the latter words, get after-gathered fruits. Should the same opinion be given as to the offspring of a female slave? As for the former words, whether they contain a promise by the defendant of an act or of the transfer of ownership by delivery, offspring are not included. But if a buyer so stipulates from a seller with the intention of novating, he is taken to stipulate the act of delivery, since it is unlikely that the seller promised more than he was bound to do in an action on sale. Still, in view of the words "delivery of vacant possession," one can say that there is liability for offspring in a stipulation for an uncertain amount; for had the female slave been delivered, the creditor on the stipulation could have had among his assets offspring born to her thereafter. 1. After the sale but before the stipulation, offspring are born or a slave acquires something for the seller. What is not recoverable [by the buyer] in an action on stipulation is recoverable in an action on sale. For whatever is not included in the novation can be claimed by the earlier title.

5 PAPINIAN, *Questions, book 28:* In an action of good faith, it is a general rule that no performance contrary to sound morals can be claimed.

6 PAPINIAN, *Questions, book 29:* An action for benefit taken was brought against the heir of the head of a household or owner. Interest was in issue. The Emperor Antoninus decided that interest was due because the head of the household or owner had paid it over a long period. 1. Our Emperor Severus ordered the imperial treasury to pay Athenagora, daughter of Flavius, whose estate had been confiscated, a million sesterces by way of dowry, because she alleged that her father had paid interest on her dowry.

7 PAPINIAN, *Replies, book 2:* A debtor at interest offered to pay his creditor and, when the latter refused, sealed, and deposited the money. No interest is claimable from that day. If, however, he is sued later and delays, the money will from then on be productive [of interest].

8 PAPINIAN, *Replies, book 7:* If horses are left as a *fideicommissum*, offspring will be due after there is delay, as being fruits; the chance of offspring being incidental, like the offspring of a female.

9 PAPINIAN, *Replies, book 11:* I gave the opinion that a stipulation for double interest on money lent, as much again as the statutory maximum, on nonpayment of the debt on a certain day is invalid. The stipulation will be valid after deduction of the extra amount for each period. 1. Interest stipulated for falls due, even if the debtor is not sued. Nor is a stipulation for the lawful rate of interest, "if lesser interest is not paid on due date," invalid. The promise is not for a penalty but, with good reason, for higher interest on the capital. But if on the creditor's death there is no one to whom money can be paid, no blame attaches for delay at that period. Hence, if greater interest is claimed, the defense of fraud can be effectively pleaded.

10 PAUL, *Questions, book 2:* A possessor must hand over offspring born after joinder of issue. He need not hand over offspring born before suit was brought for the mother, unless specifically mentioned in the suit.

11 PAUL, *Questions, book 25:* Gaius Seius, the administrator of a *res publica*, lent public money at the usual interest. However, it was customary to charge a higher rate if interest was not paid within a certain period. Some debtors failed to pay interest, but others paid extra, so that all that was owing as interest even by the defaulters was made up. Does the extra interest exacted from some debtors by way of penalty on the basis of custom go to Seius himself or to the *res publica*? I replied that if Gaius Seius stipulated for interest from the debtors, the only interest due to the *res publica* was what was formally claimable, even if some of the loans were unsatisfactory. 1. Suppose that a public slave acquires for a *res publica* an obligation to pay interest. Although interest [at a fixed rate] is by law owed to the *res publica*, it is fair that higher interest should be set off against bad debts, unless the *res publica* is prepared to bear the risk as regards all its debtors. Marcellus reports that much the same applies to tutors.

12 PAUL, *Replies, book 4:* Seia borrowed money from Septicius and agreed as follows for interest: "Unless the above interest is paid on due date or within three months, Seia is liable for higher interest; and so on for each amount due, if interest is not paid as agreed, the condition takes effect until the whole amount of the debt is paid under this clause." Do the words "and so on for each amount due, if interest is not paid as agreed, the condition takes effect" mean that if, for example, a first installment is due by stipulation, no extra interest is claimable except for that installment which is overdue? Paul replied that the clause in the stipulation about higher interest imported several conditions, one for each installment, if the lower interest on it was not paid when due. Hence, the penalty for later installments could be avoided.

13 SCAEVOLA, *Replies, book 1:* One who promised six percent interest paid less over many years. The creditor's heir sued for six percent. If it was not the debtor's fault that he paid less, can the defense of fraud or pact be raised? I replied that if the debtor paid the interest on the basis of custom over a long period without delay, a defense could, on the facts stated, be raised. 1. In an action for unauthorized administration or mandate, is interest due on uninvested money, if the principal never lent at interest?

[Scaevola] replied that if the defendant had the money on deposit, and that was the custom of the principal, nothing was due by way of interest.

14 PAUL, *Replies, book 14:* Paul gave the opinion that if there was delay in paying over a *fideicommissum,* the offspring of female slaves must also be handed over. 1. An heir was asked on his death to hand over the inheritance less income. Must the offspring of female slaves born in the heir's lifetime be handed over in view of the words of the will in which the testator mentions only the deduction of income? Paul replied that the offspring of a female slave born before the date of vesting of the *fideicommissum* were not included. Neratius, in his first book, says of a person similarly asked to restore a female that her offspring need not be restored, unless born after he was guilty of delay in handing over the *fideicommissum.* It makes no difference, I think, whether the *fideicommissum* is of the female slave or of the inheritance.

15 PAUL, *Replies, book 16:* He was of the opinion that interest was not due either on fruits to be handed over after joinder of issue at the behest of the judge, or on those gathered before, which are recovered by *condictio* as from a possessor in bad faith.

16 PAUL, *Decrees, book 1:* Interest is not payable on a gift to a *res publica.* 1. When a buyer of land from the imperial treasury was sued for interest and the buyer denied that he had been given possession, the emperor ruled that it was unjust to impose interest on someone who had not taken the fruits.

17 PAUL, *Interest, sole book:* Someone promised to pay five percent interest annually, and if he failed to pay in any year, then six percent on the total from the date of the loan. After he had paid interest for some years, the penalty clause took effect. The deified Marcus said in a rescript to Fortunatus: "Approach the governor of the province who will reduce the stipulation of whose iniquity you complain to a just amount." This *constitutio* orders that a stipulation be composed in a restricted way. What then? Such clauses are to be modified so that in future increased interest runs only from the date of default. 1. The deified Pius said in a rescript: "It is unjust of you now to claim past interest which you omitted to claim for a long period, when, to gain your debtor's favor, you thought it better not to sue him." 2. The deified Pius said in a rescript that in a tacit *fideicommissum* all gain must be taken from the heir and given to the imperial treasury. Hence, the heir loses the interest also. 3. The deified Pius held in a rescript that if a *fideicommissum* could not be paid to a *pupillus* who had no tutor, the heir was not guilty of delay. The same is true if someone was absent on public business or for some other cause for which restitution is granted and so could not sue. How can anyone be blamed for not paying when he could not, even if he wanted to? It is not an analogy that *minores* can have relief even as regards property not acquired. Interest is imposed for delay by debtors, not for the profit of plaintiffs. 4. One sued on hire need not pay interest except on default, unless he has agreed to pay interest on late payments. 5. The imperial treasury does not pay interest on its contracts, but receives interest. It does so from latrine contractors or tax farmers who pay late. But if it has succeeded to a private person, it pays interest. 6. If debtors who paid less than six percent interest become

debtors of the imperial treasury, they are bound to pay six percent thereafter. 7. It is well known that those sued for the administration of the assets of *civitates* are liable to pay interest. The same is true of curators of works, if money remains with them. But interest is remitted to the extent that they have handed money to public contractors, even negligently, provided no fraud is alleged. Otherwise interest will be added. 8. If no time limit is fixed by those who bequeath statues or portraits to be set up, the governor must fix a limit, and if the heirs do not set them up, they owe interest to the *res publica* up to four percent.

18 PAUL, *Replies, book 3:* If a buyer is evicted from land and it was from the start agreed that the seller would repay the price, interest is payable after eviction, although the buyer paid over the fruits after the true owner began a lawsuit. The loss in the intervening period falls on the buyer. 1. If the seller dies after delivery of possession leaving no certain successor, interest on the price for the intervening period, unless deposited, will be due.

19 GAIUS, *XII Tables, book 6:* Is the possessor liable for fruits in every type of suit? What if silver, clothes, or something similar, a usufruct or the bare ownership of property subject to usufruct, is sued for? There are no fruits of bare ownership as such and no neat way of computing the fruits of a usufruct. If bare ownership is sued for, fruits will be counted from the time when the fructuary lost the usufruct. If a usufruct is sued for, there should be judgment, says Proculus, for fruits gathered. Gallus Aelius also thinks that if suit is brought for clothes or a cup, the amount for which they could be hired should count as fruits. 1. If a right of way in person or with cattle is claimed, fruits can hardly be assessed, unless one counts as fruits the benefit to the plaintiff of being allowed to pass with or without cattle from the moment of suit. This should count.

20 PAUL, *Sabinus, book 12:* It is clear that illegal interest disguised as capital is not owed, but the claim for capital is not thereby vitiated.

21 ULPIAN, *Edict, book 34:* Cases in which there is a good reason for putting off payment are not cases of "delay." Suppose that the debtor wants friends to be present or time to collect money or summon sureties; or suppose a defense is alleged? That is not "delay"

22 PAUL, *Edict, book 37:* unless it is simulated in order to deceive.

23 ULPIAN, *Edict, book 34:* Again, if the debtor is suddenly compelled to leave on business of a *res publica* and has no time to give instructions for his defense, this is not "delay." The same if he is chained or in the power of the enemy. 1. It is sometimes decided that delay is impersonal, for example, if there is no one who can be sued.

24 PAUL, *Edict, book 37:* A person who delays payment but is prepared to defend an action is not guilty of "delay," at least if his appeal to law is justified. 1. A surety is bound by the debtor's delay. 2. A creditor suffers delay if there is delay toward him or his authorized or unauthorized agent. This is not a case of acquisition through a free person, but of the effect of doing a service, as when someone on my behalf catches a thief stealing from me and so gives me an action for manifest theft. Again, when a procurator gives notice to the promissor of a slave, he makes the stipulation indefeasible.

25 JULIAN, *Digest, book 7:* A person who knows that he holds land jointly with another acquires no greater share in the fruits he gathers without his co-owner's knowledge or consent than his share in the land. It does not matter whether he or his co-owner or both did the sowing, since fruits are gathered by virtue of the soil, not of the sowing. Just as a person who knowingly occupies the whole of another's land acquires no part of the fruits however sown, so the possessor of land held in common acquires no fruits in respect of his co-owner's share in the land. 1. I sowed corn on land of another which Titius had bought in good faith. Does Titius as purchaser in good faith acquire the fruits gathered? I replied that fruits gathered from land are like acquisitions which slaves make by their labor, since in taking fruits one looks more to rights over the thing from which they are taken than over the seed. No one ever doubted that if you sow corn on my land, the crops and harvest products are mine. Further, a possessor in good faith has the same right in gathering fruits as the landowner. Besides, since a fructuary takes fruits by whomever sown, how much more so a possessor in good faith, who has greater rights? For a fructuary only acquires the fruits when gathered by himself, but a possessor in good faith acquires them however separated from the soil, like the holder of a long lease of public land. 2. A buyer in good faith sowed seed and, before he gathered the fruits, discovered that the land was another's. Does he acquire fruits by gathering? I replied that a person is a buyer in good faith for the purpose of taking fruits until evicted. A slave whom I buy in good faith acquires for me from my assets and his labor so long as he is not evicted from my possession.

26 JULIAN, *From Minicius, book 6:* He said that game were not fruits of land, unless the [sole] fruits consist in game.

27 AFRICANUS, *Questions, book 8:* When there is delay to the head of a household, delay to his heir is not to be sought for. The nearest heir will get the action by hereditary right, and it is successively transmitted to the others.

28 GAIUS, *Common Matters, book 2:* The fruits of herd animals include offspring, milk,

hair, and wool. Hence, lambs, kids, and calves at once belong in full ownership to the possessor in good faith or the usufructuary. 1. But offspring of a female slave are not fruits; so they belong to the owner. It seemed absurd that a human being should count as fruits, since nature provided all fruits for man.

29 MARCIAN, *Institutes, book 14:* It is held that if someone stipulates for more than the legal amount of interest or for interest on interest, the unlawful addition is disregarded, and suit can be brought for the lawful amount.

30 PAUL, *Rules, sole book:* Even a bare pact gives *civitates* the right to interest on the money they lend.

31 ULPIAN, *Replies, book 1:* The phrase in a stipulation "and interest if due" is disregarded if the amount is not specified.

32 MARCIAN, *Rules, book 4:* The existence of delay depends not on the mere fact but on the person, that is, that the debtor, called on at an opportune place, fails to pay. This is investigated at the trial. As Pomponius, in the twelfth book of his *Letters*, says, it is difficult to define "delay." The deified Pius gave a rescript to Tullius Balbus that the existence of delay cannot be decided by imperial statute or reference to a jurist. It is a matter of fact rather than law. 1. Delay is not proved if the creditor or his procurator gives notice to the slave of an absent debtor. Even if, he says, the master were given notice, but later when present there was no insistence on his paying the debt, the debtor would not automatically be guilty of "delay." 2. In contracts of good faith, interest is payable from the date of delay. 3. What then? Suppose that a son and his father on his behalf are both liable (for a contract at the father's behest, for benefit taken, or for the son's *peculium*). Whose delay counts? If only the father is sued, he alone is liable for his own delay. But an action will be given against the son for what cannot be recovered from the father. If the son delays, the plaintiff can sue him for the whole or sue the father up to the *peculium*. 4. If two are jointly liable, the delay of one does not prejudice the other. 5. If the surety alone causes delay, he is not liable, for instance, if he kills Stichus who has been promised. However, a *utilis actio* will be given against him.

33 ULPIAN, *Duties of Curator of the Res Publica, sole book:* If public money is well invested, the debtors should not be asked to repay the capital, especially if they pay interest. If they do not, the governor of the province should look to the security of the *res publica*, so long as he is not harsh or humiliating in his exactions, but moderate, and combines a businesslike approach with human kindness. There is a great difference between careless arrogance and quiet attention to duty. 1. He must also see that public money is not lent without adequate *pignora* or *hypothecae*.

34 ULPIAN, *Edict, book 15:* Interest replaces fruits and is properly not distinct from fruits. This is accepted as regards legacies, *fideicommissa*, in the action for tutelage, and in other actions of good faith. The same is true of other income.

35 PAUL, *Edict, book 57:* Interest runs from joinder of issue.

36 ULPIAN, *Edict, book 61:* Rents of urban property are regarded as fruits.

37 ULPIAN, *Edict, book 10:* Interest can be claimed in the contrary action for unauthorized administration, if I borrow money to pay off your creditor, because he was about to be put in possession of your estate or to sell what you pledged. What if I use money I have at home for the purpose? If I have freed you from great inconvenience, I think that interest is due at the local rate, as in actions of good faith. But if I borrowed money, I recover the rate of interest I paid, at least if you benefited more than that amount of interest.

38 PAUL, *Plautius, book 6:* Let us see generally in what actions *in personam* fruits are due. 1. If land is conveyed for cause shown, for instance, for a dowry, and the alliance is broken off, fruits must be restored, at least those gathered before it was off. So must later fruits if there was impersonal delay or delay by the person who ought to have returned the land. Even if it was the woman's fault that the marriage did not take place, still she ought rather to recover fruits. The reason is that if the fiancé was not liable for fruits, he could neglect the land. 2. If I pay over land which is not owed and recover it, I should also recover fruits. 3. The same is true if there is a gift of land *mortis causa* and the donor recovers and has a *condictio*. 4. In the Fabian and Paulian actions in which alienations in fraud of creditors are revoked, fruits are included, since the praetor aims at fully undoing the alienation. This is not unfair, since "restore," which he uses here, has a wide meaning and covers fruits. 5. So when the praetor requires restitution, as in the interdict against force, fruits must be restored. 6. If I deliver a thing by force or fear, it is not "restored" to me unless fruits are recovered; nor does delay on my part affect this. 7. If I have an action to acquire what is not mine, as on a stipulation, I do not get fruits, although there is delay. But if action is joined, Sabinus and Cassius think that in equity fruits after joinder must be given over, so that incidentals are recovered. I think that is correct. 8. In sale, too, fruits must be handed over. 9. In partnership fruits must be shared. 10. If, being owner, I revoke a physical possession, what about fruits? In deposit and loan for use, as stated, fruits must be handed over. 11. In the interdict against force or stealth, all incidentals including fruits must be restored. 12. Fruits gathered before marriage are part of the dowry and are recoverable along with it. 13. The same is true of the fruits of urban property. 14. I want to divide land with you, you refuse, and I till it. Must fruits be divided after deduction of expenses? I think they must. 15. In other

actions of good faith, fruits must always be handed over. 16. If a dowry is prelegated, fruits gathered before marriage form part of it.

39 MODESTINUS, *Distinctions, book 9:* The young of horses bequeathed as a *fideicommissum* are due once the heir delays. If a stud is bequeathed, any increase through births is part of it, even if there is no delay.

40 MODESTINUS, *Rules, book 4:* The computation of interest is properly made to that day on which the creditor sold the objects pledged.

41 MODESTINUS, *Replies, book 3:* A tutor held liable delayed the execution of the judgment by an appeal. Herennius Modestinus gave the opinion that the appeal judge could award interest for the interim period if he thought that the appeal was made with a view to delay. 1. Lucius Titius, who owed a hundred and interest for a certain period, sealed a deposit for less than he owed. Is not Titius liable for interest on the deposit? Modestinus replied that unless the loan was given on terms that it could be repaid in parts, interest on the whole debt ran when the creditor was prepared to receive the whole, and the debtor, failing to repay the whole, deposited part only. 2. Gaius Seius took a loan from Aulus Agerius with the following writing: "I, '*X*' have acknowledged receipt of and received from 'Y' by way of loan ten, which I will repay on the first of such-and-such a month with the agreed interest." What interest, if any, can be claimed on such a document? Modestinus replied that if the agreed rate of interest could not be proved, no interest could be claimed.

42 MODESTINUS, *Replies, book 11:* Herennius Modestinus gave the opinion that fruits gathered from the land, after ownership had passed by way of *fideicommissum*, belonged to the fideicommissary, even though the greater part of the year elapsed before the date on which the *fideicommissum* took effect.

43 MODESTINUS, *Replies, book 18:* Herennius Modestinus gave the opinion that the assignee of actions by the imperial treasury cannot sue for interest for the period after the treasury recovered the debt, unless promised by stipulation.

44 MODESTINUS, *Encyclopaedia, book 10:* No one can stipulate for a penalty in lieu of interest above the lawful maximum.

45 POMPONIUS, *Quintus Mucius, book 22:* Husband or wife who gather fruits from a gift acquire them provided they get them by their own efforts, as by sowing. If, however, they pick an apple or cut wood, they do not, nor does any possessor in good faith, since these are not fruits of their efforts.

46 ULPIAN, *Edict, book 62:* Expenses in gathering fruits undoubtedly reduce the amount of the fruits.

47 SCAEVOLA, *Digest, book 9:* He gave the opinion that one who was ready to defend an action was not guilty of delay if his opponent withdrew.

48 SCAEVOLA, *Digest, book 22:* A husband bequeathed his wife the usufruct of a third, and if she had children, the ownership. The heirs accused her of forging the will and other crimes, and so the claim for the legacies was obstructed. Meantime, the woman

had a son and so the condition was fulfilled. Once the will was proved genuine, were fruits also due to the woman? Scaevola held that they were.

49 JAVOLENUS, *From the Posthumous Works of Labeo, book 3:* Power to mortgage a thing is part of its fruits.

2

TRANSMARINE LOANS

1 MODESTINUS, *Encyclopaedia, book 10:* A "transmarine loan" consists of money carried abroad. If it is spent where lent, it is not "transmarine." But are goods bought with the money in the same position? It depends on whether they are carried at the lender's peril. If so, the loan is transmarine.

2 POMPONIUS, *Plautius, book 3:* Labeo says that if there is no one on the side of the promisor who can be sued for a transmarine loan, that fact should be solemnly recorded as the equivalent of bringing an action.

3 MODESTINUS, *Rules, book 4:* The risk of a transmarine loan is on the creditor from the day on which it is agreed that the ship should sail.

4 PAPINIAN, *Replies, book 3:* It makes no difference whether a transmarine loan is not given at the lender's risk or the risk ceases to be on the lender after the date fixed and the fulfillment of the condition. In these two cases, no more than the statutory interest is owing: in the first case, never; in the second, not after cessation of the risk. A *pignus* or *hypotheca* does not involve higher interest. 1. If a daily rate is stipulated for the services of a slave traveling in connection with a transmarine loan, the amount due is limited to twelve percent and to double in all. If there is a separate stipulation for interest after the risk has passed, the rate can be made up to the statutory limit from the stipulation for services.

5 SCAEVOLA, *Replies, book 6:* In exchange for bearing a risk, a person may recover what he has given and something else besides money, even if no penal condition is fulfilled, provided the transaction is not a gamble. Examples from which *condictiones* arise are "if you do not manumit," "if you do not do so-and-so," "if I do not get well," and so forth. No doubt also if I give a large sum to a fisherman who wants to buy tackle on terms that he repays me if he makes a catch or to an athlete to enable him to support himself and compete on terms that if he wins, he repays me. 1. In all these cases, a pact can increase the obligation without a stipulation.

6 PAUL, *Questions, book 25:* A lender lent money at a transmarine rate of interest and took a mortgage over the goods in the ship. If they were not sufficient to pay the whole, he took a mortgage over the goods, bonded to their own lenders, in other ships. The question was whether, if the first ship was lost within the time limit and the whole could have been paid from that ship, the loss fell on the creditor or the shortfall could be made up from the other ships. I replied that a diminution of mortgaged property falls on the debtor, not the creditor. But since a transmarine loan is given on terms that the creditor can sue for it only if the ship arrives safely within the time limit, on

failure of the condition the debt itself is discharged. Hence, there is no action even to possess the goods not lost. The ship is lost within the time limit; the condition fails; and the action for the possession of the goods in the remaining ships is without cause. When, then, could the creditor sue for the possession of those further goods? When the condition is fulfilled, but the goods originally mortgaged are lost by some other accident, or sold off cheap, or the ship is lost after the time limit has passed.

7 PAUL, *Edict, book 3:* In some contracts, interest is owed as if on a stipulation. Thus, if I lend ten as a transmarine loan on terms that I recover capital and interest at a certain rate if the ship is safe, I can sue for the capital and interest[, even if I have not taken a stipulation].

8 ULPIAN, *Edict, book 77:* Servius says that no action can be brought for the penalty on a transmarine loan, if it is the creditor's fault that repayment within the prescribed time limit was not accepted.

9 LABEO, *Persuasive Views Epitomized by Paul, book 5:* If a penalty is promised for a transmarine loan, as is usual, although at the date for payment no one is alive who owes the money, the penalty falls due as if there were an heir of the debtor.

3

PROOF AND PRESUMPTIONS

1 PAPINIAN, *Questions, book 3:* If the issue is whether someone has a clan or *gens*, he must prove it.

2 PAUL, *Edict, book 69:* Proof lies on him who asserts, not on him who denies.

3 PAPINIAN, *Replies, book 9:* When a tacit *fideicommissum* is imposed on a person who has the same share in both wills or a greater share in the second, the party sued must prove change of intention, since an owner's wish for secrecy generally leads him to continue to rely on the heirs he has once appointed by will.

4 PAUL, *Replies, book 6:* His opinion was that the buyer must prove that the slave in question fled before he was sold.

5 PAUL, *Replies, book 9:* His opinion was that a party who alleges that his opponent is barred by a rule of law, and especially a statute or *constitutio*, must prove it. 1. Also that one who denies that an emancipation is valid must prove it.

6 SCAEVOLA, *Replies book 2:* He held that a patron must, in order to be able to recover part of what has been parted with, clearly prove that his freedman has parted with something in order to defraud him.

7 PAUL, *Views, book 2:* In the absence of proof of earlier flight, reliance may be put on what a slave says under torture, since he is questioned about himself, not for or against his owner.

8 PAUL, *Plautius, book 18:* If a son denies being in his father's power, the praetor requires the son first to prove this. This is because of the respect the son owes his father and because he is, in a way, claiming to be free. In the same way, one who claims liberty must first prove it.

9 CELSUS, *Digest, book 1:* If there is a pact in which the heir is not mentioned, the question is put whether it applies only to the original party. Although one who raises a defense must indeed prove it, the plaintiff must show that the agreement applied only to the other party and not to his heir, since we generally provide for our heirs as well as ourselves.

10 MARCELLUS, *Digest, book 3:* The senate resolved that the census and public monuments prevail over witnesses.

11 CELSUS, *Digest, book 11:* A *pupillus* need not prove that the sureties given for his tutor were not adequate when given. Proof lies on those who had the duty to see that security was provided for the *pupillus.*

12 CELSUS, *Digest, book 17:* A will gave you a legacy of five hundred. The same amount was mentioned in a later codicil. Did the testator wish to duplicate the legacy or just mention it again, forgetting he had bequeathed it in the will? On which party does proof lie? At first sight, it seems fair that the plaintiff should prove his case. But sometimes proof lies on the defendant. Thus, if I claim a debt and the debtor says that the money has been paid, he must prove this. So here, when the plaintiff produces two documents and the heir says that the later one is invalid, the heir must prove it to the judge.

13 CELSUS, *Digest, book 30:* When a man's age was in issue, our emperor gave a rescript in these terms: "It is hard and unjust, when someone's age is in question and divergent statements are put forward, that the most prejudicial should prevail. The truth should be sought by *cognitio* and the number of years fixed rather at that figure which has the most credible evidence in its favor."

14 ULPIAN, *Duties of Consul, book 2:* If an apparent freedman claims to be freeborn, the question arises who plays the part of plaintiff. If he was acting as a freedman, he will no doubt have to bring proceedings for free birth and show that he was freeborn. But if he was acting as freeborn and is alleged to be a freedman, that is, of the person who so alleges, the latter must prove it. What difference can it make whether he is alleged to be his slave or freedman? If, however, someone who is confident of his free birth voluntarily sets out to prove it, so that he can have a judgment pronouncing him freeborn, should his wish be granted? I think it proper for him to be indulged as regards proof and judgment, since no legal principle stands in the way.

15 MODESTINUS, *Replies, book 12:* A man claiming to be the son of Gaius Seius by Seia seized the inheritance of Gaius, who had brothers, paid *fideicommissa* to his brothers as if on the mandate of the deceased, and took a written receipt. They later learned that he was not their brother's son and asked whether they could sue him for their brother's estate, since they had made out the document as if to his son. Modestinus replied that the receipt for the *fideicommissum* in no way confirmed the status of

someone whom the brothers could prove was not the son of the deceased. But the brothers must prove this.

16 TERENTIUS CLEMENS, *Lex Julia et Papia, book 3:* Even a mother's declaration about her children is accepted. A grandfather's should be too.

17 CELSUS, *Digest, book 6:* In an issue about the *lex Falcidia,* the heir must prove that the *lex* applies. If he cannot, he will rightly lose the case.

18 ULPIAN, *Disputations, book 6:* When workdays are claimed from a freedman, whoever claims to be patron must prove his case. Hence, Julian writes that even though in preliminary proceedings the patron appears as defendant, the plaintiff is not the freedman, but the alleged patron. 1. One who alleges fraud, even as a defense, must prove it. 2. The plaintiff should be required to prove that a formal question has been put, that is, that when asked *in jure,* he replied that he was sole heir. If he is alleged to have kept silent, the plaintiff must still prove his case, not the defendant who raises the defense that he did not answer.

19 ULPIAN, *Disputations, book 7:* In defenses, the defendant must act as plaintiff and prove the defense like a claim. Thus, if he relies on the defense of pact, he must prove that a pact was made. 1. If someone promises to appear in court and says that he did not because of absence on public business, or through the fraud of his opponent, ill-health, or storm, he must prove it. 2. If someone relies on the defense of improper representation, namely, that his opponent was not permitted to appoint or become a procurator in the case, he must prove it. 3. The same is true if money is claimed which is said to have been paid. 4. If *res judicata* is alleged or the offer of an oath in regard to the matter now in issue or that it was a gaming transaction, the defendant must prove it.

20 JULIAN, *Digest, book 43:* If someone seizes and chains a freeman, it is quite wrong for him to have the advantage of being defendant, merely because it cannot be shown that at the time when suit was first brought the man was in possession of his freedom.

21 MARCIAN, *Institutes, book 6:* I think the better view is that the plaintiff legatee must prove that the deceased knew that the property bequeathed was another's or mortgaged, not that the heir must prove that he did not know. The onus of proof always rests on the plaintiff.

22 ULPIAN, *Replies, book 1:* One who alleges a change of intention must prove it.

23 MARCIAN, *Action on Mortgage, sole book:* First of all, the agreement between plaintiff and debtor for a mortgage or pledge must be proved. If the plaintiff proves this, he must also show that the property was the debtor's at the time of agreement or belonged to the person who authorized the mortgage.

24 MODESTINUS, *Rules, book 4:* If a deed is canceled, though the debtor is presumed discharged, he can rightly be sued for the amount which the creditor can show by clear proof is still owing to him.

25 PAUL, *Questions, book 3:* When money not owed is in issue, who must prove that it is not owed? The distinction to be adopted is that if the party who is said to have received money or property which was not owing denies this and the payer by lawful proof shows that the payment was made, the party who denies receipt must, to be heard, in every case show that the money was owing. It is quite absurd for the party who initially denied receipt, which was later proved, to require his opponent to show that the money was owing. But if he from the start admits that he received money but asserts that it was owing, no one doubts that the presumption is for the recipient. No payer is ever so careless as to throw his money around and waste it on debts not owed, especially if the payer is a careful and diligent head of his household, who would not easily be credited with a mistake. Hence, the party who says he has paid money not owing must prove that he did so through the fraud of the recipient or some just cause of ignorance. Unless he does this, he fails to recover. 1. But if the person who claims to have paid money not due is a ward, *minor*, woman or man of full age who is a soldier, farmer or person inexpert in court matters, simple-minded or slothful, then the recipient must show that the money paid was properly received and was owing to him. If he does not, it is repaid. 2. This is the position if the payer alleges that the whole sum paid was not owing. If the issue is whether part was not owing, because, though initially owing, the debt was discharged and then by mistake paid a second time or paid despite a valid defense, the payer must in every case prove this: that by mistake he paid more than was owing, or paid twice, or paid despite a valid defense. The general rule is that those who raise defenses or allege the payment of debts must prove their case. 3. In all the instances mentioned, the party bearing the onus of proof may offer his opponent an oath as to the truth of the issue, first himself taking an oath against calumny, so that the judge can give judgment according to the oath, subject to the opponent's right to refer the oath back. 4. So much for payment of what is not due. If, however, a deed is said to be executed for what is not owing and the cause is not stated in the deed, the creditor must show that the debt in the deed is owing, unless the party who executed it specifically explains the cause for his doing so. In that case, he must stand by his admission, unless he can show by very clear proof in writing that he promised what was not owing.

26 PAPINIAN, *Questions, book 20:* Procula's brother owed her a large sum by way of *fideicommissum.* On his death, she wished to bring this into account with his heirs. However, it was alleged that she had never asked her brother to pay during his lifetime, though her accountant had for various causes often paid money to her brother's

accountant. The deified Commodus heard the case and refused a set-off, since she had impliedly released her brother from the *fideicommissum.*

27 SCAEVOLA, *Digest, book 33:* A testator bequeathed to a person entitled to take up to a certain amount that amount. He went on: "I leave Titius one hundred which he left with me. The reason I did not give a deed for this was that I kept, without giving security, everything that had come to him from his mother. I also want one hundred fifty to be repaid to Titius from the fruits of his land which I took and sold myself, and loans at interest from his mother's estate, if any, which I converted to my own use." Can Titius claim these amounts? Scaevola replied that if Titius could prove that the above sums had reached the testator from his own money, he could. But it looked as if the testator had, in fraud of the law, added this clause because Titius could not take more.

28 LABEO, *Persuasive Views, Epitomized by Paul, book 7:* If an arbitrator must decide whether the memory of a building work is extant, he should inquire whether anyone remembers its being done. PAUL: No. When in a case tried by an arbitrator the memory of a building work is in issue, the question is not whether someone remembers the day or consulship in which the work was done, but whether the date can in some way be proved. This must be taken, in the Greek phrase, "broadly." It may not be remembered in detail; it may have been constructed within a certain period, but no one remembers the exact consulship. However, if all agree that they neither saw nor heard the work being done nor heard from others who had seen or heard it and so on *ad infinitum*, memory of the work being done is not extant.

29 SCAEVOLA, *Digest, book 9:* The Emperors Antoninus and Verus Augusti gave a rescript to Claudius Apollinaris as follows: "Proof of the status of children does not

depend merely on the statements of witnesses. Letters addressed to wives, if agreed to be genuine, are by imperial decree almost equivalent to written instruments." 1. A pregnant wife was divorced, gave birth to a son, and in the husband's absence, declared him illegitimate in the records. The question is whether he is in the power of his father, and can, at his father's wish, accept the inheritance of his mother who died intestate; or is he barred by his mother's irate declaration? Scaevola replied that there was still room for the truth.[1]

4

DOCUMENTARY EVIDENCE AND LOSS OF DOCUMENTS

1 PAUL, *Views, book 2:* "Instruments" include all the evidence relevant to a case. Hence, both oral evidence and witnesses are regarded as instruments.

2 PAUL, *Views, book 5:* A person sued by the imperial treasury must be met not with a summary or copy of a writing, but with the original, provided it proves the contract. For a vexatious document is admittedly not regarded as valid in legal proceedings.

3 PAUL, *Replies, book 3:* It was Paul's opinion that a deed should not be antedated, but that this did not amount to forgery by those who agreed to it, since the debtor and creditor were present and concurred, and the debtor was more to blame.

4 GAIUS, *Action on Mortgage, sole book:* As in the case of consensual contracts, it does not matter what words are used to mortgage property. An agreement for a mortgage not in writing, if proved, will be effective. The point of writing is to prove the transaction more easily, but the transaction, if proved, is valid without it, like an undocumented marriage.

5 CALLISTRATUS, *Questions, book 2:* If the course of events affords proof of a matter without reduction to writing, the transaction is valid despite the absence of a document.

6 ULPIAN, *Edict, book 50:* Where the issue is with whom a will should be deposited, we always prefer the elder to the younger, the higher in rank to the lower, male to female, and freeborn to slave born.

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1. I concur with Mommsen in omitting 22.3.30–31.

5

WITNESSES

1 ARCADIUS CHARISIUS, *Witnesses, sole book:* Oral evidence is often and necessarily given and should be sought particularly from those who are reliable. 1. Witnesses can be called not only in criminal cases but, when appropriate, in money suits, if not forbidden to testify nor excused from testimony by any statute. 2. Though some statutes mention a large number of witnesses, imperial *constitutiones* reduce this to a sufficient number, so that judges should allow only the number they think necessary to be called, lest an unbridled license to call superfluous witnesses becomes vexatious.

2 MODESTINUS, *Rules, book 8:* The value of testimony depends on the dignity, faith, morals, and gravity of witnesses. Hence, those who depart from their previous evidence are not to be listened to.

3 CALLISTRATUS, *Cognitiones, book 4:* The reliability of witnesses must be carefully assessed. One must first inquire into their status. Are they decurions or plebeians? Do they lead an honest and blameless life, or has there been some mark of disgrace? Are they well off or needy, so that they may readily act for gain? Are they enemies of those against whom they give evidence or friends of those for whom they give it? Evidence can be admitted if it is free from suspicion, because of the witness (an honest man) or the motive (not gain, favor, or enmity). 1. Hence, the deified Hadrian gave a rescript to Vibius Varus, legate of the province of Cilicia, that the judge knows best what weight to attach to witnesses. It runs as follows: "You know best what weight to attach to witnesses, what their dignity and reputation is, who speaks simply, and whether they keep to a premeditated story, or give likely answers to your *ex tempore* questions." 2. There is a rescript of the same emperor to Valerius Verus about assessing witness evidence as follows: "It is impossible to define strictly the amount and mode of proof needed on each issue. The truth can often but not always be found without recourse to public records. Sometimes the number of witnesses, sometimes their dignity and authority, at others common knowledge settles the truth of the matter in

issue. In short, all I can reply to you is that a *cognitio* should not be tied at once to a single mode of proof. You must judge from your own conviction what you believe and what you find not proved." 3. The deified Hadrian also sent a rescript to Rufinus, proconsul of Macedonia, that he should believe witnesses, not depositions. This part of the letter runs: "Alexander made charges against Aper before me. He did not prove them or produce witnesses but wanted to use depositions, which are out of place before me, since my practice is to question witnesses. I sent him to the governor, to inquire about the veracity of the witnesses and, if he did not make out his charges, relegate him." 4. The same emperor gave the following rescript to Gabinius Maximus: "The evidence of witnesses actually present has a different weight from that of depositions recited in court. So reflect and, if you believe the witnesses, give them expenses." 5. The *lex Julia* on force provides that evidence should not be given against a person accused under this statute by a person freed by him or his parent; an *impubes*; one found guilty of a criminal offense, unless reinstated; a person chained or in public custody; one who has hired himself to fight beasts; a female prostitute present or past; or a person liable or found guilty of taking money for giving or not giving evidence. Some are excluded from giving evidence out of respect for persons, some for their want of judgment, some for marks of bad repute in their way of life. 6. Witnesses should not lightly be summoned from long distances, still less soldiers called away from their military duties, as the deified Hadrian said in a rescript. The deified brothers also wrote: "So far as summoning witnesses is concerned, the careful judge should find out what the practice is in the province in which he is judge." If it is found that several witnesses are often summoned to another *civitas* to give evidence, the witnesses whom the judge thinks necessary for the *cognitio* should undoubtedly be summoned.

4 PAUL, *Lex Julia et Papia, book 2:* The *lex Julia* on criminal proceedings provides that no one who is unwilling should be summoned to give evidence in court against his father-in-law, son-in-law, stepfather, stepson, cousin, or cousin's child, or those nearer in degree; and likewise no one's freedman should be summoned nor the freedman of his child, parent, husband, wife, patron, or patroness. Further, that a patron or patroness cannot be compelled to give evidence against a freedman nor a freedman against a patron.

5 GAIUS, *Lex Julia et Papia, book 4:* When statutes provide that a son- or father-in-law cannot be compelled to give evidence against his will, "son-in-law" includes a daughter's fiancé and "father-in-law," a fiancée's father.

6 LICINIUS, RUFINUS, *Rules, book 2:* Those who can be ordered to give evidence are not satisfactory witnesses.

7 MODESTINUS, *Rules, book 3:* A slave's answer can be relied on when there is no other means of discovering the truth.

8 SCAEVOLA, *Rules, book 4:* Those who are old, ill, soldiers, absent with a magistrate on public business, or not allowed to come cannot be compelled to give evidence against their will.

9 PAUL, *Sabinus, book 1:* A father is not a satisfactory witness for a son or a son for a father.

10 POMPONIUS, *Sabinus, book 1:* No one is a satisfactory witness in his own cause.

11 POMPONIUS, *Sabinus, book 33:* To confirm the occurrence of a transaction even a witness who is not called counts.

12 ULPIAN, *Edict, book 37:* If the number of "witnesses" is not mentioned, two are enough, since the plural is satisfied by two.

13 PAPINIAN, *Adultery, book 1:* Can those found guilty of the crime of calumny give evidence in criminal proceedings? The *lex Remmia* does not forbid them, nor did the *lex Julia* on force, corruption, or embezzlement. But the statutory omission will be made good by the judge's sense of duty; for he has to weigh the testimony even of a man of unblemished character.

14 PAPINIAN, *Adultery, sole book:* Can someone found guilty of adultery witness a will? Properly speaking he is barred from testimony. Hence, I think that a will witnessed by such a person is invalid at civil law and, since it follows civil law, also in praetorian law. Hence, the inheritance cannot be formally accepted, nor can *bonorum possessio* be given.

15 PAUL, *Views, book 3:* A person found guilty of corruption cannot witness a will or give evidence. 1. Whether a hermaphrodite can witness a will depends on his sexual development.

16 PAUL, *Views, book 5:* False, inconsistent, or double-faced witnesses are appropriately punished by the judge.

17 ULPIAN, *Rules, sole book:* A father and son-in-power, or two brothers in the same father's power, can witness the same will or transaction, since nothing bars several

persons from the same household from witnessing another's transaction.

18 PAUL, *Adultery, book 2:* The fact that the *lex Julia* on adultery forbids a woman found guilty to give evidence shows that women have the right to give evidence at a trial.

19 ULPIAN, *Duties of Proconsul, book 8:* Tax farmers need not give evidence unless they wish, nor one who is absent but not with a view to avoiding giving evidence, nor an army contractor. 1. Neither can *pupilli* be summoned to give evidence.

20 VENULEIUS, *Public Offenses, book 2:* The accuser should not summon a man accused of a crime or under 25 to give evidence.

21 ARCADIUS CHARISIUS, *Witnesses, sole book:* A person held liable for a defamatory verse is an incapable witness. 1. If the matter requires it, it is unobjectionable for a magistrate who is present, as well as a private person, to give evidence. The senate also resolved that a praetor should give evidence in a trial for adultery. 2. If the matter is such that an arena-fighter or similar person has to be called as a witness, his evidence should not be believed without torture. 3. If the witnesses are all of the same honest reputation and the circumstances and inclination of the judge agrees with them, their evidence should be followed. But if some, though fewer, disagree, that evidence should be accepted which fits the circumstances and is not tainted by suspicion of favor or enmity. The judge confirms his personal view from the arguments and evidence that seem more appropriate and closer to the truth. What is decisive is not numbers, but sincere and reliable testimony which illuminates the truth.

22 VENULEIUS, *Duties of Proconsul, book 2:* Local magistrates should see that they themselves and other witnesses and signatories are available for those who wish to make declarations before witnesses, so that transactions are facilitated and proof of them is available.

23 VENULEIUS, *Criminal Proceedings, book 1:* A person who has previously given evidence against an accused person cannot be produced as a witness [for the accused].

24 PAUL, *Views, book 5:* It is held that witnesses produced by an accuser from his household cannot be tortured.

25 ARCADIUS CHARISIUS, *Witnesses, sole book:* Imperial mandates provide that a governor must see that those who represent clients in law suits do not give evidence in cases in which they appear. The same applies to court officials.

6

MISTAKE OF LAW AND FACT

1 PAUL, *Edict, book 44:* Mistake is of fact or law. 1. Thus, if someone does not know that a man of whose estate he can claim *bonorum possessio* is dead, time does not run

against him. If, however, he knows that his cognate is dead but not that he can claim *bonorum possessio* by virtue of the relationship or knows that he is heir by will but not that the praetor gives the heir by will *bonorum possessio*, time runs against him because his mistake is of law. The same applies if the brother of the deceased thinks that his mother has priority. 2. Someone who does not know he is a cognate may be mistaken as to fact or law. If he knows he is free and who his parents are, but not that he has rights as a cognate, his mistake is of law. But if someone, perhaps exposed at birth, does not know his parents and acts like someone's slave, believing he is one, his mistake is of fact rather than law. 3. Again, if someone knows that *bonorum possessio* is open to another but not that the time for claiming it is passed, his mistake is of fact. The same is true if he thinks that the other has obtained a grant. But if he knows that the other has let the time pass without claiming but not that he himself can claim *bonorum possessio* by the edict on succession, time runs against him, since his mistake is of law. 4. The same is true if one instituted heir to the whole thinks that he cannot claim *bonorum possessio* until the will is opened. But if he thinks there is no will, his mistake is of fact.

2 NERATIUS, *Parchments, book 5:* Mistake of law should not in any branch of the law be treated like mistake of fact, since the law can and should be definite, while the interpretation of facts often baffles even very careful people.

3 POMPONIUS, *Sabinus, book 3:* Not to know another's legal and factual position is very different from not knowing one's own rights. 1. But Cassius reports that Sabinus held that "not knowing" does not cover the mistake of a slipshod and careless man.

4 POMPONIUS, *Sabinus, book 13:* Mistake of law is said not to avail in usucapion, but mistake of fact admittedly does.

5 TERENTIUS CLEMENS, *Lex Julia et Papia, book 2:* It is totally unfair for someone to be prejudiced by another's knowledge or benefited by another's ignorance.

6 ULPIAN, *Lex Julia et Papia, book 18:* There is no excuse for supine ignorance of fact, but scrupulous inquiry is not required. The sort of knowledge looked for is that which does not excuse gross negligence or laxity, but does not demand the curiosity of an informer.

7 PAPINIAN, *Questions, book 19:* Mistake of law does not benefit those who wish to acquire, but does not prejudice those who sue for their own.

8 PAPINIAN, *Definitions, book 1:* Mistake of fact does not prejudice even males in regard to loss or gain, and mistake of law does not benefit even females in regard to gain. But mistake of law does not prejudice anyone in regard to the loss of his own property.

9 PAUL, *Mistake of Law and Fact, sole book:* It is a rule of law that mistake of law prejudices, mistake of fact does not. In what cases does this apply? Those under twenty-five are allowed to be ignorant of the law. So are women in some cases, owing to the infirmity of their sex. Hence, apart from delict, they are not prejudiced by mistake of law. So if a *minor* lends money to a son-in-power, he obtains relief and is treated as not having lent it to a son-in-power. 1. A soldier who is a son-in-power is made heir by a fellow soldier and does not know that he can accept without his father's consent under imperial *constitutiones*. He may rely on mistake of law and claim time for acceptance. 2. Mistake of fact avails someone only if he is not guilty of gross negligence. Thus, suppose the whole *civitas* knows what he alone does not? Labeo rightly

defines knowledge as that neither of a very inquisitive nor of a very negligent man, but one who makes careful inquiry as to the matters with which he is concerned. 3. Labeo confines the rule that one cannot rely on mistake of law to those who have legal advice available or are themselves competent. Hence, if they could easily know, they cannot rely on mistake. This view is seldom appropriate. 4. If a buyer did not know that the seller was owner, facts are more important than belief. Hence, though he thought he bought from a nonowner, if the owner delivers to him, he becomes owner. 5. A letter of the deified Pius says that a mistake of law does not avail one who fails to rely on the *lex Falcidia*. The Emperors Severus and Antoninus also said in a rescript: "An undue payment made by way of *fideicommissum* cannot be recovered unless made by mistake. The heirs of Gargilianus paid money under his will to the *res publica* of Cirta to build an aqueduct. They not merely failed to take the normal security for the return by the citizens of the surplus over what the *lex Falcidia* allows, but even stipulated that the money should not be converted to other uses, and knowingly allowed it to be spent on an aqueduct. Hence, they cannot reclaim the money from the town of Cirta as being more than was owed, since it is unjust both to recover money paid for an aqueduct, and to make the *res publica* pay from its own assets for a work, the credit for which goes wholly to another's generosity. But if they reclaim the money on the ground that they failed by mistake to rely on the *lex Falcidia*, they should know that mistake of fact, not law avails and that relief is granted to those who err, not to fools." 6. Though the letter mentions citizens of a town, the same applies to any free person. Nor is the denial of repayment confined to the construction of aqueducts. For the beginning of the *constitutio* is general. It shows that if a *fideicommissum* not due is paid without mistake, it cannot be recovered. The rule that a person who by mistake of law fails to rely on the *lex Falcidia* cannot recover is equally general. On this basis, even if the money left and paid as *fideicommissum* was not for something to be made and was not spent but is in the hands of the payee, it cannot be recovered.

10 PAPINIAN, *Replies, book 6: Impuberes* acting without their tutor have neither capacity nor knowledge.

BOOK TWENTY-THREE

1

BETROTHALS

1 FLORENTINUS, *Institutes, book 3:* Betrothal is the announcement and mutual promise of marriage in the future.

2 ULPIAN, *Betrothal, sole book:* "Betrothal" was so called from the "solemn plighting of troth," since it was customary for our ancestors to stipulate and solemnly promise their wives-to-be to each other.

3 FLORENTINUS, *Institutes, book 3:* This is the derivation of the term "betrothed" for both sexes.

4 ULPIAN, *Sabinus, book 35:* Agreement alone is sufficient for betrothal. 1. It is agreed that betrothal can take place in the absence of the parties, and this is quite common,

5 POMPONIUS, *Sabinus, book 16:* as long as the absent parties know of it or ratify it afterward.

6 ULPIAN, *Sabinus, book 36:* If a girl's tutors have given notice that her betrothal is over, I do not think this will be enough to put an end to her prospect of marriage, any more than they alone could have arranged her betrothal, unless this has all been done with the girl's consent.

7 PAUL, *Edict, book 35:* As far as betrothal is concerned, it makes no difference whether witnesses are present or a solemn promise is made without anything in writing. 1. Betrothal needs the consent of the same people as marriage. According to Julian, the father of a daughter-in-power is presumed to consent, unless it is clear that he does not.

8 GAIUS, *Provincial Edict, book 11:* It must be obvious that insanity is an impediment to betrothal, but if it arises afterward, it will not invalidate it.

9 ULPIAN, *Edict, book 35:* Julian was asked if a marriage contracted while the girl was under twelve years old constitutes a betrothal. I have always approved of the view taken by Labeo here, that if a betrothal took place before the marriage, it continued to exist, even though the girl had begun to live at his house as a wife; but if there was no betrothal beforehand, the fact that she had been brought to his house is not held to constitute a betrothal. Papinian agrees with this view.

10 ULPIAN, *Disputations, book 3:* The father of a daughter-in-power can give notice to her betrothed, ending the betrothal. But if she has been emancipated, he cannot do this or bring the *condictio* for property given as dowry, because the girl constitutes the dowry herself by getting married and annuls the *condictio* which might have arisen from nonreciprocation. But if it could be maintained that the father gave the dowry on behalf of his emancipated daughter on condition that if he did not consent to the marriage, whether it had been contracted or not he could get back what he gave, then he will have an action for its recovery.

11 JULIAN, *Digest, book 16:* Betrothal, like marriage, takes place with the consent of the parties to it. So, as in the case of marriage, a daughter-in-power must consent to her betrothal.

12 ULPIAN, *Betrothal, sole book:* But if she does not oppose her father's wishes, she is held to consent. A daughter can only refuse to give her consent where her father chooses someone who is unfit for betrothal because of his bad behavior or character.

13 PAUL, *Edict, book 5:* The betrothal of a son-in-power cannot be carried out in his name where he refuses his consent to it.

14 MODESTINUS, *Distinctions, book 4:* There is no fixed age for the parties in betrothal as there is in the case of marriage. So betrothal can take place at a very early age, provided that what is being done is understood by both parties, that is, as long as they are not under seven years of age.

15 MODESTINUS, *Problems Solved, sole book:* A tutor cannot marry his own ward or marry her to his son. Note, however, that what we are saying about marriage also applies to betrothal.

16 ULPIAN, *Lex Julia et Papia, book 3:* An oration of the Emperors Antoninus and Commodus, which prohibited senators from marrying certain people, did not say anything about betrothals. Still betrothals in these circumstances are quite rightly held to be void at common law, so as to supply the omission in the oration.

17 GAIUS, *Lex Julia et Papia, book 1:* There are often just and necessary reasons for prolonging a betrothal not merely for a year or two, but even for three or four years or more, such as the ill-health of either of the parties, the death of their parents, being charged with capital crimes, or long journeys which have to be made.

18 ULPIAN, *Edict, book 6:* When betrothals are being contracted, it does not matter much whether this is done by the parties themselves (in person, by sending a messenger, or by letter) or by someone else. The conditions in the marriage contract are nearly always settled by intermediaries.

2

FORMATION OF MARRIAGE

1 MODESTINUS, *Rules, book 1:* Marriage is the union of a man and a woman, a partnership for the whole life involving divine as well as human law.

2 PAUL, *Edict, book 35:* Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.

3 PAUL, *Sabinus, book 1:* According to Pomponius, if I have a grandson by one son and a granddaughter by another who are both in my power, my authority alone will be enough to allow them to marry, and this is correct.

4 POMPONIUS, *Sabinus, book 3:* A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband.

5 POMPONIUS, *Sabinus, book 4:* It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she

is absent, she cannot be married by letter or by messenger because she must be led to her husband's house, not her own, since the former is, as it were, the domicile of the marriage.

6 ULPIAN, *Sabinus, book 35:* Finally according to Cinna, where a man married a woman in her absence, and on his way back from dinner by the side of the Tiber, he died, it was held that she ought to mourn for him as his wife.

7 PAUL, *Lex Falcidia, sole book:* So it is possible here for a virgin to have a dowry and an action for dowry.

8 POMPONIUS, *Sabinus, book 5:* A freedman cannot marry his mother or sister where they too have been freed, because this rule is founded on morality, not law.

9 ULPIAN, *Sabinus, book 26:* If a grandson wishes to marry and the grandfather is insane, his father's consent will be absolutely necessary, but if his father is insane and his grandfather sane, the grandfather's consent will suffice. 1. A man whose father has been captured by the enemy can marry, if he does not return within three years.

10 PAUL, *Edict, book 35:* There is justifiable doubt about what to do where a father is absent, so that it is not known where he is or whether he is still alive. If three years have passed from the time when it was known for sure where the father was and whether he was alive or not, his children of either sex will not be prevented from contracting a lawful marriage.

11 JULIAN, *Digest, book 62:* Where the son of a man who is in enemy hands, or otherwise absent, marries before his father has been in captivity or absent for three years, or if his daughter gets married, I think that both marriages will be valid, provided the son or daughter marries someone whose status the father will be sure not to repudiate.

12 ULPIAN, *Sabinus, book 26:* If, on being repudiated by me, my wife marries Seius, whom I subsequently adrogate, the marriage is not incestuous. 1. There can be no marriage between me and a woman betrothed to my father, although she cannot really be called my stepmother. 2. On the other hand, a woman betrothed to me cannot marry my father, although she cannot really be called his daughter-in-law. 3. If my wife after a divorce marries someone else and has a daughter, according to Julian, although she is not my stepdaughter, I ought not to marry her. 4. I can marry my adopted sister's daughter, because she is not related to me by blood, since no one becomes an uncle by adoption. Only legitimate adoptions, that is, those involving agnatic rights, create such relationships. On the same principle, I can marry my adoptive father's sister, as long as they did not have the same father.

13 ULPIAN, *Sabinus, book 34:* If a patroness is so degraded that marriage at least with her own freedman is honorable, it should not be prohibited by the judge who is investigating the matter.

14 PAUL, *Edict, book 35:* Where an adopted son has been emancipated, he cannot

marry his adoptive father's wife, since she is in the position of a stepmother. 1. Similarly, if someone adopts a son, he will not be able to marry his wife, who is in the position of a daughter-in-law, even after the son is emancipated, because she was once his daughter-in-law. 2. Blood relationship between slaves must be considered in connection with this rule. So on manumission a man cannot marry his own mother, and the rule is the same for a sister and a sister's daughter. On the other hand, it must be said that a father cannot marry his daughter, if they have been manumitted, even where it is doubtful whether he is her father. So a natural father cannot marry his daughter who was born out of wedlock, because natural law and decency must be taken into consideration in marriage, and it is indecent to make a daughter into your wife. 3. The same rule which applied to blood relationship between slaves must also be observed in cases of relationship by marriage between slaves. So, for example, I cannot marry a woman who lived with my father while they were slaves just as if she were my stepmother, and conversely, a father cannot marry the woman who lived with his son while they were slaves, just as if she were his daughter-in-law. Nor can anyone marry the mother of a woman he lived with in slavery, just as if she were his mother-in-law; for since blood relationship between slaves is recognized, why not relationship by marriage as well? But in doubtful cases it is more certain and more decent not to marry in these circumstances. 4. Now let us see how the terms "stepmother," "stepdaughter," "mother-in-law," and "daughter-in-law" are to be understood, so that we can see who it is that we cannot marry. Some take a stepmother to be a father's wife, a daughter-in-law a son's wife, and a stepdaughter a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law," and "daughter-in-law" are to be understood, so that we can see who it is that we cannot marry. Some take a stepmother to be a father's wife; a daughter-in-law, a son's wife; and a stepdaughter, a wife's daughter by another husband. But it is better to say here that a man cannot marry his grandfather's or great-grandfather's wife. So there are two or more stepmothers whom he cannot marry. This is not surprising, since someone who has been adopted cannot marry either his natural or his adoptive father's wife. If my father has several wives, I cannot marry any of them. So the term "mother-in-law" includes not just my wife's mother but also her grandmother and great-grandmother, so that I cannot marry either of them. Again, the term "daughter-in-law" includes not only a son's wife but also the wife of a grandson or great-grandson, although some call these people "grand-daughters-in-law." "Stepdaughter" means not just my wife's daughter but also her granddaughter and great-granddaughter; I cannot marry any of them. Augustus decided that I cannot marry the mother of someone who was betrothed to me, since she was once my mother-in-law.

15 PAPINIAN, *Replies, book 4:* A man cannot marry the former wife of his stepson, nor can a woman marry someone who was once her stepdaughter's husband.

16 PAUL, *Edict, book 35:* An oration of the deified Marcus provides that if a senator's daughter marries a freedman, the marriage will be void, and this was followed by a *senatus consultum* to the same effect. 1. Where a grandson marries, his father must also consent; but if a granddaughter gets married, the consent and authority of the grandfather will suffice. 2. Insanity prevents marriage being contracted, because consent is required; but once validly contracted, it does not invalidate the marriage.

17 GAIUS, *Provincial Edict, book 11:* When the relationship of brother and sister arises because of adoption, it is an impediment to marriage while the adoption lasts. So I will be able to marry a girl whom my father adopted and then emancipated. Similarly, if she is kept in his power and I am emancipated, we can be married. 1. It is advisable, then, for someone who wishes to adopt his son-in-law to emancipate his daughter and for someone who wishes to adopt his daughter-in-law to emancipate his son. 2. We are not allowed to marry our paternal or maternal aunts or paternal or maternal great-aunts although paternal and maternal great-aunts are related in the fourth degree. Again, we are not allowed to marry a paternal aunt or great-aunt, even though they are related to us by adoption.

18 JULIAN, *Digest, book 16:* Renewed marriage between the same persons is not held to be valid unless their relatives consent.

19 MARCIAN, *Institutes, book 16:* By chapter thirty-five of the *lex Julia*, people who wrongfully prevent children in their power from marrying, or who refuse to provide a dowry for them in accordance with the *constitutio* of the deified Severus and Antoninus, can be forced by proconsuls and provincial governors to arrange marriages and provide dowries for them. Those who do not try to arrange marriages are held to prevent them.

20 PAUL, *Oration of the Deified Severus and Commodus, sole book:* Note that it is not one of a curator's functions to see that his ward is married or not, because his duties only relate to transacting business for her. A rescript of Severus and Antoninus stated this in the following words: "It is a curator's duty to administer his ward's affairs, but she can marry or not as she pleases."

21 TERENTIUS CLEMENS, *Lex Julia et Papia, book 3:* A son-in-power cannot be compelled to marry.

22 CELSUS, *Digest, book 15:* Where he marries someone because his father forces him to do so and he would not have married her if the choice had been his, the marriage will nevertheless be valid, because marriage cannot take place without the consent of the parties; he is held to have chosen this course of action.

23 CELSUS, *Digest, book 30:* The *lex Papia* provides that all freeborn men, apart from senators and their children, can marry freedwomen.

24 MODESTINUS, *Rules, book 1:* Living with a freewoman implies marriage, not concubinage, as long as she does not make money out of prostitution.

25 MODESTINUS, *Rules, book 2:* An emancipated son can marry without his father's consent, and any son he has will be his heir.

26 MODESTINUS, *Replies, book 5:* He replied that women accused of adultery cannot marry during the lifetime of their husbands, even before conviction.

27 ULPIAN, *Lex Julia et Papia, book 3:* If a man of senatorial rank purports to marry a freedwoman, though she does not become his legal wife in the meantime, she is in a position to become his wife if he loses his rank.

28 MARCIAN, *Institutes, book 10:* A patron cannot marry his freedwoman against her will.

29 ULPIAN, *Lex Julia et Papia, book 3:* And Ateius Capito is said to have decreed this when he was consul. Note, however, that this rule does not apply where the patron manumitted her in order to marry her.

30 GAIUS, *Lex Julia et Papia, book 2:* A pretended marriage has no effect.

31 ULPIAN, *Lex Julia et Papia, book 6:* Where a senator is given imperial permission to marry a freedwoman, she will be his lawful wife.

32 MARCELLUS, *Lex Julia et Papia, book 1:* Note that although a freedman, who was adrogated by someone who was born free, acquires the rights of a freeborn person in that family, as a freedman he is still barred from senatorial marriage.

33 MARCELLUS, *Lex Julia et Papia, book 3:* Many take the view that when the same woman goes back to he same man, it is the same marriage. I agree, provided they are reconciled before much time has elapsed, and neither one has married someone else in the meantime, and above all, if the husband has not returned the dowry.

34 PAPINIAN, *Replies, book 4:* A general commission to find a husband for a daughter-in-power is not a sufficient ground for marriage. So it is necessary for the person selected to meet the father and for him to consent in order for the marriage to be contracted. 1. After the dropping of the charge, a man is not prohibited from taking again as wife a woman whom he accused of adultery in his capacity as husband: but even if he did not accuse her in his right as a husband the marriage will seem to be lawfully contracted. 2. Marriage can be contracted between stepchildren, even if they have a common brother, the child of their parents' new marriage. 3. Where a senator's daughter has contracted marriage with the son of a freedman, his fall does not make her a wife, since children should not be deprived of their rank because of their father's offenses.

35 PAPINIAN, *Replies, book 6:* A son-in-power in the army cannot contract a marriage without his father's consent.

36 PAUL, *Questions, book 5:* A tutor or a curator cannot marry an adult woman in his care, unless she was betrothed to or intended for him by her father, or where the marriage takes place in accordance with a condition in his will.

37 PAUL, *Replies, book 7:* The freedman of a girl's curator ought to be prevented from marrying her.

38 PAUL, *Views, book 2:* Where someone holds office in a province, he cannot marry a woman who was born there or lives there, although betrothal is not forbidden. But if, after he has laid down his office, the woman refuses to marry him, she can do so, as long

as she returns any earnest she received. 1. A person holding office in a province can marry a woman to whom he was previously betrothed, and the dowry will not be confiscated. 2. Someone involved in provincial administration is allowed to arrange marriages for his daughters there, and provide dowries for them.

39 PAUL, *Plautius, book 6:* I cannot marry my sister's great-granddaughter, because I am in the position of a parent to her. 1. If someone marries a woman whom he is morally obliged not to, he is said to commit incest.

40 POMPONIUS, *From Plautius, book 4:* Aristo replied that a man could not marry his stepdaughter's daughter, any more than he could marry his stepdaughter herself.

41 MARCELLUS, *Digest, book 26:* Women who live in a shameful way and make money out of prostitution, even where it is not done openly, are held in disgrace. 1. If a woman lives as a concubine with anyone other than her patron, I would say that she lacks the character of the mother of a household.

42 MODESTINUS, *Formation of Marriage, sole book:* As far as marriages are concerned, it is always necessary to consider not just what is lawful but also what is decent. 1. If the daughter, granddaughter, or great-granddaughter of a senator marries a freedman or someone who was an actor, or whose father or mother were actors, the marriage will be void.

43 ULPIAN, *Lex Julia et Papia, book 1:* We would say that a woman openly practices prostitution not just where she does so in brothels but also where she is used to showing she has no shame in taverns or other places. 1. "Openly," then, we take to mean anywhere, that is, without preference, not just a woman who commits adultery or fornication, but one who plays the part of a prostitute. 2. Again, because a woman has intercourse with one or two men after accepting money from them, she is not held to have practiced open prostitution. 3. According to Octavenus, even a woman who openly practices prostitution but accepts no money should be included in this category, and he is quite right. 4. The law brands with *infamia* not just the woman who practices prostitution but also anyone who has done so in the past, even though she no longer behaves in this way; the disgrace is not removed by stopping the behavior. 5. Poverty is no excuse for a woman living a shameful life. 6. Procuring is no better than prostitution. 7. Women who prostitute other women for money we call "procuresses." 8. By "procuress," we mean a woman who leads this kind of life on behalf of someone else. 9. Where one woman keeps an inn and employs others as prostitutes (as many often do on the pretext that they are servants), she must be classed as a procuress. 10. The senate decreed that it was improper for a senator to marry or keep a woman convicted of a criminal offense, where anyone could bring the charge, unless there was some legal prohibition on bringing such a charge in court. 11. Where a woman has been publicly convicted of making a false accusation or *praevaricatio*, she is not held to have been convicted of a criminal offense. 12. A woman caught in adultery is in the same position as one convicted of a criminal offense. So if she is shown to be guilty of adultery, she will be branded with *infamia* not just because she was caught in adultery but also because she has been convicted of a crime. However, if she was not caught in adultery, but was convicted of it, she will suffer *infamia* because of the conviction. If she has been caught in adultery, but not convicted, would she still

suffer *infamia*? I think that even if she were acquitted after being caught, she will still suffer *infamia*, because it is clear that a woman taken in adultery suffers *infamia* automatically by statute, no judgement being required. 13. We are not told here, as in the *lex Julia* on adultery, who must catch her or where it must be done; so it seems she will suffer *infamia* whether it is her husband or someone else who catches her. Even if she is not caught in her husband's house or her father's, she will suffer *infamia* according to the terms of the statute.

44 PAUL, *Lex Julia et Papia, book 1:* The *lex Julia* provides that: "A senator, his son, or his grandson, or his great-grandson by his son shall not knowingly or fraudulently become betrothed to or marry a freedwoman, or a woman who is or has been an actress or whose father or mother are or have been actors. Nor shall the daughter of a senator, his granddaughter by his son, or great-granddaughter by his grandson become betrothed to or marry, knowingly or fraudulently, a freedman, or a man who is or has been an actor or whose father or mother is or has been an actor. Nor shall any of these people knowingly or fraudulently become betrothed to or marry such a woman." 1. This chapter prevents a senator from marrying a freedwoman or a woman whose father or mother have been actors. The same applies to a freedman marrying a senator's daughter. 2. There is no obstacle to a marriage in the fact that someone's grandfather or grandmother has been an actor. 3. No distinction is drawn between a father who has his daughter-in-power and one who does not. However, according to Octavenus, even if the child is illegitimate, its father as well as its mother must be taken as its lawful parents. 4. Again, it makes no difference whether the father is a natural or adoptive one. 5. Would it be an obstacle if he had been an actor before the adoption? Or if a natural father had been one before his daughter's birth? Where a man in this disgraced condition adopts someone, then emancipates her, would it be wrong to marry her? What if her natural father, who was of the same kind, has died? According to Pomponius, in the circumstances, this view would be contrary to the meaning of the statute, so that people of this kind should not be classed with the others, and he is quite right. 6. If the father or mother of a freeborn woman became actors after her marriage, it would be most unfair to divorce her, since the marriage was respectable when it was contracted, and there may already be children. 7. Obviously, if the woman herself becomes an actress, she should be divorced. 8. Senators cannot marry women that other freeborn are not allowed to marry.

45 ULPIAN, *Lex Julia et Papia, book 3:* There is a provision which states that where a freedwoman was once married to her patron, she cannot marry someone else without his consent. In accordance with the rescript of our emperor and his deified father, we include as a patron someone who has bought a female slave under the condition of manumitting her, since on manumission she is considered the freedwoman of her buyer. 1. He, however, who swore he was her patron will not have the same right. 2. Nor should the man who did not buy the woman with his own money be considered her patron. 3. Clearly, in the case of a son-in-power in the army, we have no doubt that he acquires this right if he manumits a female slave who is part of his *peculium castrense*. This is because he becomes her patron in accordance with imperial *constitutiones*, and his father does not acquire this right. 4. This section applies only to a freedwoman who has been married, not to one who was betrothed. So if a freedwoman who was betrothed gives notice of repudiation to her patron, she has the right to marry someone else, even if her patron is unwilling for her to do so. 5. The statute says, "if her patron is unwilling"; being unwilling we should take to mean not consenting to a divorce. So a woman who divorces an insane person is not exempt from complying with the statute, nor is a woman who divorced her husband without his knowledge, since he can more accurately be described as unwilling than someone who actually refuses his consent. 6. In the case of a patron who has been captured by the enemy, I am inclined to think that the woman involved has the right to marry, just as she could if he were dead. But those who take Julian's view say that she does not have

the right to marry because, according to Julian, a freedwoman's marriage continues even where her patron is in captivity, because of the respect she owes him. It is clear, however, that if the patron is enslaved in any other way, the marriage is undoubtedly dissolved.

46 GAIUS, *Lex Julia et Papia, book 8:* There is some doubt whether this rule applies to a patron who marries a freedwoman in whom someone else has joint rights. According to Javolenus, it does not, because she cannot properly be considered to be one man's freedwoman when she is also another's. Others take the opposite view, since it is undeniable that she is one person's freedwoman, even if she is also someone else's; this is quite rightly the majority view.

47 PAUL, *Lex Julia et Papia, book 2:* A senator's daughter who has been a prostitute or an actress or has been convicted of a criminal offense can safely marry a freedman, because a woman who has behaved so disgracefully has no honor left.

48 TERENTIUS CLEMENS, *Lex Julia et Papia, book 8:* The statute accords the same rights to a patron's son in the marriage of his father's freedwoman as it gives to the patron himself. The same applies where the son or one patron during the other's lifetime marries the freedwoman of them both. 1. If a patron marries a disgraced freedwoman, it is settled that he cannot benefit by this statute since he married in contravention of it. 2. Where one son marries a freedwoman assigned by will to another, he will not acquire the same rights as a patron. Indeed, he will have no rights at all over her, because the senate transferred all such rights over freedmen assigned to someone to that person, as his father intended.

49 MARCELLUS, *Lex Julia et Papia, book 1:* Note that the lower orders can marry certain women where those of higher rank cannot legally do so, because of their superior position. On the other hand, the upper classes cannot marry certain women where those of lower rank are prohibited from doing so.

50 MARCELLUS, *Lex Julia et Papia, book 3:* It is said to have been recently decided that if someone marries his freedwoman, whom he had manumitted under a *fideicommissum*, she can marry someone else later without his consent. I think this is correct, since a man ought not to have the rights of a patron where he manumits someone because he had to, not because he wanted to. He did not confer any benefit on the woman, but gave her the freedom which was hers by right.

51 LICINNIUS RUFINUS, *Rules, book 1:* A female slave manumitted for the purpose of marriage cannot get married to anyone other than the man who manumitted her unless he renounces his right as her patron to marry her. 1. But if a son-in-power is ordered by his father to manumit a female slave for the purpose of marriage, according to Julian, she is in the same position as if she had been manumitted by the father, and so he can marry her.

52 PAUL, *Sabinus, book 6:* There can be no dowry where the marriage is incestuous, and so everything received in connection with it is forfeit, even where it comes under the head of profits.

53 GAIUS, *Provincial Edict, book 11:* There can be no marriage between those in the categories of parents and children whether they are related in the first or more distant degrees *ad infinitum.*

54 SCAEVOLA, *Rules, book 1:* It makes no difference whether the relationship is based on a valid civil law marriage or not; for a man cannot marry his sister even if she is illegitimate.

55 GAIUS, *Provincial Edict, book 11:* It is considered to be so abominable to marry an adopted daughter or granddaughter that the same rule continues to operate even where the adoption is ended by emancipation. 1. I cannot marry my adoptive father's mother, his maternal aunt, or his granddaughter by his son as long as I am in his family. When I have been emancipated, however, clearly nothing prevents such a marriage, because I am not considered to be related to them after my emancipation.

56 ULPIAN, *Disputations, book 3:* A man commits incest by keeping his sister's daughter as a concubine, even if she is a freedwoman.

57 MARCIAN, *Institutes, book 2:* Anyone holding office in a province cannot consent to his son's marriage there.

57 *a* MARCIAN, *Note on* PAPINIAN, *Adultery, book 2:* The deified Marcus and Lucius, emperors, in a rescript to Flavia Tertulla by means of a freedman who was a surveyor, stated: "We are moved by the length of time you have lived in matrimony with your uncle in ignorance of the law, and the fact that your marriage was arranged by your grandmother, as well as your numerous children. All these factors taken together lead us to confirm the legal status of your children, the issue of a marriage contracted forty years ago, so that they shall be considered legitimate."

58 MARCIAN, *Rules, book 4:* A rescript of the deified Pius states that if a freedwoman deceives a senator into marrying her by claiming to be freeborn, an action, based on the one in the praetor's edict, should be given against her, since she cannot make a profit from a dowry which is void.

59 PAUL, *Assignment of Freedmen, sole book:* The *senatus consultum,* which provides that a tutor cannot arrange a marriage between her and his son or marry her himself, also applies to grandsons.

60 PAUL, *Oration of the Deified Antoninus and Commodus, sole book:* Where someone is not actually a tutor, but has a tutor's responsibilities, does he come within the scope of the oration? For example, suppose his ward has been captured by the enemy, or he withdraws from tutelage on the basis of false excuses, so that he remains responsible under the sacred *constitutiones.* The *senatus consultum* must be held applicable in these circumstances, since it has been established that liability of this kind existed where three tutelages were involved. 1. But where a person becomes liable on someone else's account, let us see whether he is outside the ambit of the *senatus consultum.* Suppose, for example, a magistrate incurs responsibility in a case involving tutelage, or someone gives a verbal guarantee on behalf of a tutor or curator. Because under such circumstances these things are not equated with having three tutelages, it must consequently be approved. 2. What, therefore, if an honorary tutor is appointed? Insofar as this type of tutelage is not counted in the number listed, surely the position is not the same? Reason, however, leads to the opposite conclusion, because an honorary tutor is said to be used to liability for maladministration of tutelage. 3. There is no doubt that the

oration applies to someone who, on being appointed a tutor, neglects his administrative duties, since he is liable under the sacred *constitutiones* just as if he had carried them out. 4. But suppose a tutor wanted to be excused on some ground or other but could not produce any proof at the time, so that the investigation of his excuse was deferred, and meanwhile his ward had come of age. Would the *senatus consultum* apply? The answer depends on whether his excuse could be accepted after the ward has reached the age of puberty and the tutelage was over. If it can be, he will be discharged and can marry her with impunity; but if it cannot be accepted at the end of his period in office, he cannot legally marry her. Papinian, in the fifth book of his *Replies*, says that at the end of his period in office, his excuse should not be accepted, and so he is responsible for the time which has elapsed. I do not agree with this at all, because it is unjust for a tutor not to be excused for a delay which was not fraudulent, but was a necessary one, or for his marriage to be stopped once his excuse has been accepted. 5. Though the terms of the oration provide that a tutor cannot marry his ward, this must be understood to mean that he cannot even be betrothed to her, since she cannot generally be betrothed to someone with whom she cannot contract a marriage; where a woman can be married, she can lawfully be betrothed. 6. But what if the adopted son of a tutor marries the ward unlawfully and then be emancipated? We must take it that the senate did not have children who have been adopted and then emancipated in mind, because on emancipation the adoptive family is entirely left out of consideration. 7. The natural children of a tutor, even where they have been adopted by someone else, are covered by the *senatus consultum.* 8. But what if a tutor, on being appointed, appeals, and his heir is then defeated? He must be held responsible during this period. What if the heir is the tutor's son and he is defeated, does the oration apply here? It follows that it would, since he must render an account.

61 PAPINIAN, *Questions, book 32:* Where a dowry is confiscated because the marriage was unlawful, the husband must pay back all that he would have to in an action on dowry, with the exception of the necessary expenses which usually reduce the dowry by operation of law.

62 PAPINIAN, *Replies, book 4:* Although a father was willing to leave the marriage of his daughter to her mother, she cannot select a tutor for this task, because the father is presumed not to have envisaged a tutor being involved, since he especially wanted the mother herself to do it, not to hand the matter of her daughter's marriage over to a tutor. 1. It is improper for a woman to marry the freedman of her husband who is also her patron. 2. Where a tutor renders an account to a curator, he cannot marry the girl before she comes of age at the appointed time, even if she has become a mother by contracting another marriage in the meantime.

63 PAPINIAN, *Definitions, book 1:* Where the prefect of a cohort or of cavalry, or a tribune marries a woman of the province in which he holds office in spite of the legal prohibition, the marriage will be void. The case is similar to that of a ward, since both marriages are forbidden because positions of power are involved. But if a girl does marry in this instance, there is room for doubt whether she can be deprived of what was left to her by will. As in the case of a ward marrying her tutor, however, she can acquire everything which has been left to her. But any money given to her as dowry must be returned to the heir.

64 CALLISTRATUS, *Questions, book 2:* The senate decreed that a freedman who was also the tutor of his patron's daughter should be relegated because she had married him or his son. 1. I think that the *extraneus heres* of a tutor is covered by the terms of the *senatus consultum* which prohibits marriage between tutors and their sons and their wards, since marriages of this kind are forbidden in order to prevent wards

being cheated out of their family property by those who are compelled to account to them for the administration of the tutelage. 2. A tutor is not prohibited from marrying his daughter to his ward.

65 PAUL, *Replies, book 7:* Those who serve as soldiers in their own countries do not contravene the regulations by marrying in their own province. Certain imperial decrees also state this. 1. Paul, in the same place, replied in connection with this: "I take the view that even though a marriage is contracted in a province contrary to the regulations, once the man lays down his office, and if the parties are still of the same mind the marriage will become lawful, and so any children born afterward will be the legitimate children of a valid marriage."

66 PAUL, *Views, book 2:* Where a tutor or a curator marries his ward himself, or gives her in marriage to his son before she has reached the age of twenty-six, unless she was betrothed to him by her father or allotted to him by will, the marriage will be void. Both parties will suffer *infamia* and be punished in extraordinary proceedings according to the ward's rank. It makes no difference here whether the son is independent or subject to parental power. 1. It is highly improper for the freedman of a curator to marry the ward of his patron who administers her affairs.

67 TRYPHONINUS, *Disputations, book 9:* A tutor's son is prohibited from marrying the ward whose tutelage the father is bound to account for. This is true whether the tutor is alive or dead. I do not think it makes any difference whether the son becomes his heir, or rejects his father's estate, or does not become the heir at all (because either he was disinherited or passed over after emancipation). For it could happen that property which has been fraudulently transferred to him by his father may have to be recovered because of the tutelage. 1. Doubt on one point may arise. Where a grandfather administers the tutelage of his emancipated son's daughter, can he then marry her to a grandson by another son whether emancipated or still in his power, since his equal affection for them both will remove any suspicion of fraud? Although strictly the *senatus consultum* affects all kinds of tutors, nevertheless, because of the great affection shown by the grandfather, a marriage of this kind should be allowed. 2. Where a son-in-power is a girl's tutor or curator, I think there is even more reason for not allowing her to marry his father. Surely, she should not be allowed to marry his brother, who is in the power of the same father? 3. If the son of Titius marries a girl who was your ward, and you then adopt Titius or his son, let us see whether the marriage will be annulled, as it will in the case of an adopted son-in-law, or whether adoption will be an impediment to the marriage. This is the better view, and it also applies to a curator who, while carrying out his duties, adopts the husband of the girl whose curator he is. For as soon as the tutelage is at an end, and the girl is married to someone else, in order to prevent the adoption of her husband, I think it would be necessary to show that it was contrived to prevent an account of the tutelage being rendered, which the oration of the deified Marcus included as a ground for preventing such marriages. 4. Where a curator for the property of an unborn child is appointed, the prohibition in

the *senatus consultum* will also apply to him, because he too must render an account. The time spent in administration should not concern us, because long or short, the time spent by a tutor or a curator in carrying out this kind of duty is irrelevant. 5. While Titius was administering the tutelage of a ward, or as her curator transacting business for her, she died before he had rendered his account and left a daughter as her heir. Could Titius give her in marriage to his son? I said he could, because the account due to the estate was a simple debt. Otherwise, every debtor who was liable to her for any reason at all would be unable to marry her himself or marry his son to her. 6. Where a tutor stops his ward from accepting her father's estate, he should give her some explanation. If he acted without seeking advice, he might have judgment rendered against him because of it. But even if, after taking proper advice, he applied to the praetor because the girl's father died insolvent, as this must be proved in court, nevertheless, there will be an impediment to marriage. For the person who has administered a tutelage well and in good faith still cannot marry here.

68 PAUL, *Senatus Consultum Turpillianum, sole book:* Where a man marries one of his female ascendants or descendants, he commits incest according to the *jus gentium.* Someone who marries a female relative in the collateral line where this is forbidden or a woman connected by affinity where there is some impediment will incur a lighter penalty where he does this openly, but a heavier one if he does it secretly. The reason for this difference is that in the case of unlawfully contracted marriages in the collateral line, those who commit the offense in public are excused from the heavier penalty because they are considered to have acted in error. On the other hand, those who commit it in secret are punished because they acted in defiance of the law.

3

THE LAW OF DOWRY

1 PAUL, *Sabinus, book 14:* The right to a dowry is perpetual, and in accordance with the wishes of the person who provides it, an agreement is made to the effect that it will always remain in the husband's possession.

2 PAUL, *Edict, book 60:* It is in the public interest for women's dowries to be kept safe, as this allows them to marry.

3 ULPIAN, *Edict, book 63:* The term "dowry" has no place where the marriage is void, because there can be no dowry without a marriage. So where the word "marriage" is not applicable, there can be no dowry either.

4 PAUL, *Sabinus, book 6:* Where a usufruct accedes to mere title given as a dowry, this is held to be an increase in the existing dowry, not a second one, just as if an accession was made by alluvion.

5 ULPIAN, *Sabinus, book 31:* A profectitious dowry is one which came from a father or other ascendant as part of his property or the result of some transaction. 1. So where an ascendant or his procurator presents a dowry, or orders someone else to do so, or where an unauthorized agent does so on his behalf and the ascendant ratifies his act, this is a profectitious dowry. 2. If someone wishing to make a gift to the father presents a dowry, according to Marcellus in the sixth book of his *Digest,* this dowry comes from the father; this is quite correct. 3. Again, if the curator of an insane person or a prodigal, or anyone else, gives a dowry, we call this a profectitious dowry as well. 4. Suppose, however, that the praetor or a governor issues a decree stating how

much of a father's property should be given to his daughter as a dowry since he has been captured by the enemy or caught by bandits; this is also held to be profectitious. 5. According to Julian, a dowry is not profectitious where a father refuses an inheritance so as to provide a dowry (perhaps because his daughter's husband has been made a substitute or would be able to claim the inheritance on intestacy). But if the father rejects a legacy so that it could stay in the possession of his son-in-law, the heir, by way of dowry, according to Julian this is not something derived from the father's property, because he did not pay out his own money, but simply did not acquire the legacy. 6. Where a father promises a dowry not in the capacity of a parent, but because he has given a verbal guarantee on someone else's behalf and must therefore pay, according to Neratius this dowry is not profectitious, although the father cannot recover what he has paid from the principal debtor. 7. But if the father promises the dowry and provides a verbal guarantee or another debtor on his behalf, I think the dowry will be profectitious, because it is sufficient for the father to be liable either to the principal debtor or to the guarantor. 8. Where a son-in-power borrows money and commits the provision of a dowry for his daughter to the creditor, or if he receives the money and gives it, the dowry is held to derive from her grandfather according to Neratius in that he must provide a dowry for his granddaughter; for the transaction seems to have been for the grandfather's benefit. 9. According to Julian in the seventeenth book of his *Digest*, where anyone gives a fixed sum of money to his father so that he can give it to his daughter as a dowry, this is not profectitious dowry; for the father is bound to give the money, and if he does not do so, a *condictio* will lie against him. He also says that this rule applies to a mother, because if she gives a sum of money to her husband on condition that he pays it to his son-in-law as a dowry for his daughter, the wife is not held to have donated the money to her husband, as he quite rightly says. So this gift is not one of those prohibited by the civil law, as she did not give it to her husband for him to keep, but to pay it to her son-in-law, for her daughter's sake. Thus, if he does not give it to him, a *condictio* will be available against him. According to Julian, this dowry is adventitious, and we hold it to be this also. 10. Where a son-in-power promises a dowry and presents it on becoming independent, it is profectitious, because he does not pay the money as a debt of his father's estate, but as a debt of his own, incurred when he was a son-in-power from which he is released by becoming the head of a household. 11. If a father gives a dowry on behalf of his emancipated daughter, there is no doubt it is still profectitious, because it is not parental power, but actually being a parent which makes a dowry profectitious. This is only true where the father gives the dowry as a parent; where he is in debt to his daughter and presents it at her request, the dowry will be adventitious. 12. According to Papinian in the tenth book of his *Questions*, where a father who is his independent daughter's curator provides a dowry for her, he will be held to have done this as her father rather than her curator. 13. Julian says in the nineteenth book of his *Digest* that if an adoptive father presented the dowry, he has the right to recover it. 14. If someone promises a dowry on behalf of someone else's daughter and her father becomes the promisor's heir, Julian distinguishes between a father who becomes the heir and gives the dowry before the marriage, and one who does so afterward. If it was done before the marriage, the dowry is held to be profectitious (because he could recover it by giving notice). If it was done after marriage, it would not be profectitious.

6 POMPONIUS, *Sabinus, book 14:* The law assists a father who has lost his daughter by returning the dowry which he provided so as to comfort him and not let him suffer the loss of his daughter and his money. 1. Where a father gives as a dowry land which, though it belongs to another, was bought in good faith, the dowry is understood to be

profectitious. 2. Where a dowry has been given and either of the parties has been cheated, relief is granted even to someone over twenty-five years old, because it is not consistent with what is right and proper for one person to profit by another's loss, or suffer loss because of another's gain.

7 ULPIAN, *Sabinus, book 31:* Equity demands that the profits on a dowry shall belong to the husband; since he bears the burdens of marriage, it is only fair that he receives the profits. 1. Profits made during marriage do not belong to the dowry, but those made before the marriage become part of it, unless there was some agreement on this between the parties who were to be married; then the profits are not restored because they are considered to be a gift. 2. Where a usufruct is given as a dowry, let us see whether or not its profits must be returned. According to Celsus in the tenth book of his *Digest,* we must discover what the parties have done about this. Where there is no agreement to the contrary, he thinks that the dowry consists of the right of usufruct alone, not the profits. 3. Where property is given as a dowry, I think it becomes part of the husband's estate and that the wife's period in possession should accede to her husband. Property given as a dowry during the marriage becomes the husband's. What if it was given before the marriage? If the woman gave it on the understanding that it should become his immediately, it will do so. But if she gave it on condition that it would become his when the marriage took place, we can say without a doubt that it will belong to him when the marriage does take place. So if the marriage does not take place because of a repudiation and the woman gave the property on the understanding that it would belong to the husband straight away, she will have to bring a *condictio* for it when notice of repudiation is given. But if she gave it on condition that it would become his as soon as the marriage took place and notice of repudiation is given, she can reclaim it immediately. But if she reclaims it before notice of repudiation has been given, a defense of fraud or one *in factum* will bar the claim; for such a claim should not be brought for the recovery of property intended as a dowry.

8 CALLISTRATUS, *Questions, book 2:* Unless, clearly, there has been such an agreement, it will be presumed, so that the property immediately passes to the betrothed, and, unless the marriage takes place, it must be returned.

9 ULPIAN, *Sabinus, book 31:* If I give property to Seia so that she can give it on her own behalf as a dowry, it becomes hers, even if it is not presented as a dowry; but a *condictio* will lie against her. If I give something on her behalf before marriage, the condition under which I gave it makes a difference to whether it will become her husband's at once, or after the marriage takes place. If it was to become his immediately, when notice of repudiation has been given, I will have a *condictio*; if not, I have a claim for it, because it is still mine. So if the marriage cannot take place because of some prohibition, here the property will remain mine. 1. If I deliver property to anyone to be a dowry after the marriage has taken place and I die before the marriage, does the property become a dowry if the marriage takes place afterward? I doubt whether it will belong to the person to whom it is given, because the person who gave it loses his title to it after death, since the gift was in suspense until the day of the marriage. When the condition of the marriage taking place is fulfilled, ownership of the property will already have passed to the heir, and it must be held that he cannot be deprived of the property without his consent. But the more generous view is one in favor of the

dowry and for the heir to be required to consent to the deceased's act, or if he defers his decision or is absent, whether he is unwilling or absent, ownership should be transferred to the husband by law, so that the woman is not without a dowry. 2. We must understand property given as a dowry to mean property given for the sake of a dowry. 3. Where property is given as what the Greeks call *parapherna* and the Gauls *peculium*, let us see whether it becomes the husband's straight away. I think that if it is given with this intention it passes to him at once and if the marriage is dissolved, the woman should not claim it as hers, but bring a *condictio*, not an action for dowry, as the deified Marcus and our emperor stated in a rescript. The position is clear where a written record of the wife's property is given to her husband, as is commonly done at Rome (since a wife usually records in writing the property which she is going to use in her husband's house and which is not included in the dowry, so that he can sign the list, as having received this property; in accordance with this deed of his, the wife then remains in possession of the property she brought into his house, as contained in the list); let us see whether this property belongs to the husband. I do not think it does, not because it is not delivered to him (for what difference will it make whether it is delivered to him or brought to his house with his consent?), but because I do not believe that the husband and wife agreed to this in order to transfer ownership to him, but rather to make it clear that the property had been brought to his house, so that this could not be denied in the event of a separation. The husband often assumes responsibility for the custody of this property unless the wife is left in charge of it. Let us see whether, if this property is not returned, the woman can bring an action for the unlawful removal of property, an action on deposit or mandate. Where the husband is given custody over this property, she can bring an action on deposit or mandate. If he was given something less than custody, the action for the unlawful removal of property will lie if the husband keeps the property with the intention of appropriating it. An action for production will lie if he has not tried to remove it.

10 ULPIAN, *Sabinus, book 34:* It is not usually in the husband's interest for the property to be valued, so that he is not made liable for it, especially if he receives animals or women's clothing as a dowry. If such things are valued and the wife wears them out, the husband will still be liable for the amount at which they were valued. So when property is given as a dowry without valuation, any profit or loss is the wife's. 1. Where land which has not been valued receives some accession, this will benefit the wife, and if it drops in value, the loss will be hers. 2. Where slaves are given as a dowry and have offspring, the husband does not benefit by them. 3. But the progeny of cattle given as a dowry belong to the husband, because they are considered to profits. Still, as it is a priority that the property does not diminish, and where any animals die, the same head of cattle must be replaced by their offspring, the husband only makes a profit from the rest, because the profits from the dowry are his. 4. Where property given as a dowry is valued before marriage, this valuation is, as it were, conditional, because it depends on whether the marriage takes place. So when it does, the valuation becomes perfect and a genuine sale. 5. Thus, the question arises whether the woman must bear the loss if slaves valued before the marriage die. It follows that she must, because as the sale is conditional if death occurs while the condition is pending, this makes the sale void. It must follow that the woman makes a loss here, because the sale was not yet complete. 6. Even if property given as a dowry has been valued but an agreement has been made that either the amount of the valuation or the property itself shall be returned, and the following clause is added, "whichever the wife wishes," she can choose whether she prefers to demand the property or its price as valued. But

if the clause, "whichever the husband wishes," is added, he will have the right of selection; or where nothing is said about the selection, the husband will be entitled to choose whether he would rather surrender the property or pay the price. For where one thing or another is promised, there is a right of selection as to which he will give. But where the property is no longer in existence, he must pay the price.

11 PAUL, *Sabinus, book 7:* Of course, the husband can return the property, even if it has deteriorated.

12 ULPIAN, *Sabinus, book 34:* Where the property is valued after the marriage takes place, and this is approved as a gift, the valuation is void, because property cannot be sold in order to make a gift, since such a transaction between husband and wife is invalid; thus, the property will remain part of the dowry. But where this is done before the marriage, the better view is that the gift had been made at the time of the marriage and so will not be valid. 1. Where a woman says that she has been cheated by a valuation which is too low, for example, if she has been cheated over a slave, if she has been deceived into delivering the slave at all, not with regard to his value, here the slave must be returned to her. But if she was only deceived as to his value, the husband can choose whether to pay the true value of the slave or surrender him. This applies to a living slave. But if he is dead, according to Marcellus the husband must pay his price, not the true price, but the one established by the valuation, because the woman ought to seek good advice on the valuation. Where, however, the woman simply gives the slave, there is no doubt that the risk remains hers, not her husband's. Marcellus holds the same opinion where a *minor* is cheated. It is clear that if a wife has a buyer willing to pay a fair price, then a fair valuation must be made; according to Marcellus, this only needs to be done when the wife is a *minor*. But Scaevola holds that if there is fraud on the husband's part, a fair valuation must be made, and I think he is quite right. 2. Where a wife entered into a pact with her husband, who was her debtor, that he should have as a dowry what he owed her, I think she can bring an action for dowry; for although he will not be released from the earlier debt by law, nevertheless, he will have a defense.

13 MODESTINUS, *Distinctions in Dowries, sole book:* If a woman, after divorce, returns to her husband before bringing an action on stipulation to recover her dowry, it can be confidently stated that the action on stipulation will be barred by a defense of fraud, while the marriage lasts.

14 ULPIAN, *Edict, book 34:* Where a woman gives as a dowry property which has been valued and afterward delays its delivery and in the normal course of events it ceases to exist, I do not think she will have an action.

15 POMPONIUS, *Sabinus, book 14:* Where she is not to blame for the delay, she will be entitled to the price just as if she had delivered it, because anything which happens is at the buyer's risk.

16 ULPIAN, *Sabinus, book 34:* Whenever property which has been valued is given as a dowry, on being evicted from it, the husband can bring an action on sale against his wife, and whatever he recovers by doing this he must surrender to his wife in an action on dowry, if the marriage is dissolved. So if the husband receives double damages, he must give it all up to his wife. This is an equitable opinion, because the transaction is not an ordinary sale, but is carried out on behalf of the dowry, so the husband should not make a profit out of his wife's loss; it is enough for him to be indemnified, not gain by the transaction.

17 PAUL, *Sabinus, book 7:* In matters relating to the dowry, the husband is responsible

for fraud as well as negligence, because he received the dowry for his own benefit; he must exercise the same diligence as he shows in his own affairs. 1. Where property has been valued and given as a dowry, and the marriage does not take place, we must see what can be recovered, the property itself or its valuation. It seems to have been the intention of the parties that the valuation should only be made if the marriage took place, because there was no other reason for the agreement. So the property should be recovered, not its price.

18 POMPONIUS, *Sabinus, book 14:* If you have received as a dowry some slaves who have been valued and a pact has been entered into that on divorce you would return other salves valued at the same amount, according to Labeo, the offspring of these slaves will still be yours, since they were at your risk.

19 ULPIAN, *Sabinus, book 34:* Even if the dowry is given on the order of another [previous] husband, the husband will nonetheless be bound by the action on dowry.

20 PAUL, *Sabinus, book 7:* According to Julian, the following stipulation is valid, "will such-and-such a sum be given to me as a dowry when you die," since it is quite common for a pact to be entered into that the dowry will not be given during the wife's lifetime. I did not see any similarity here; for it is one thing to postpone the collection of what is due and another to stipulate right from the start for it to be paid at a time when the marriage would not exist. Aristo, Neratius, and Pomponius all agree with this.

21 ULPIAN, *Sabinus, book 35:* It is settled that a stipulation made on a dowry containing the condition, "if the marriage takes place," can only form the basis of an action where there is a marriage, even though the condition is not expressed. So if notice of repudiation is served, the condition of the stipulation is said not to have been fulfilled.

22 PAUL, *Sabinus, book 7:* And even if the woman marries the same man afterward, the stipulation will not become valid.

23 ULPIAN, *Sabinus, book 35:* But since it is not necessary to insert this addition in a stipulation on the dowry, we maintain that it is not necessary in the case of presentation of dowry either.

24 POMPONIUS, *Sabinus, book 15:* Where a daughter-in-power, who is about to marry, gives a dowry to her future husband out of her *peculium* which she has the right to administer and while her *peculium* is in the same position, there is a divorce, the dowry can be lawfully repaid to her, just like a debt from the *peculium* of any other debtor.

25 PAUL, *Sabinus, book 7:* A woman who was about to marry a man who owed her the slave Stichus entered into a pact in the following terms: "Instead of Stichus whom you owe me, consider that ten gold pieces are yours as a dowry." In accordance with the established rule that one kind of property can be substituted for another, the parties will be free from liability and the ten gold pieces will become the dowry, because dowries can be changed by agreement.

26 MODESTINUS, *Rules, book 1:* We take the view that a dowry can be changed while the marriage lasts, where this will be to the woman's advantage, if money is changed into property or property into money. This is an accepted rule.

27 ULPIAN, *Sabinus, book 36:* Where this is done, land or other property becomes dotal.

28 PAUL, *Sabinus, book 7:* A father cannot impair his daughter's position after marriage, because the dowry cannot be returned to him without the daughter's consent.

29 ULPIAN, *Sabinus, book 36:* Where a father promises a dowry on behalf of his daughter and leaves it as a legacy, if he leaves it to her husband, is the legacy valid or not? I do not think it is valid because when a debtor leaves his creditor what he owes him as a legacy, it is void. But if he leaves the legacy to his daughter, it is valid, since the dowry is due to the husband because of the promise, and the legacy is due to the daughter. If the daughter proves that the testator intended to double the legacy, she will be entitled to both, the dowry for the husband to claim and the legacy because it was left to her. But where the testator intended her to have one or the other, if the woman claims the legacy and is met with a defense of fraud, the heir will not be compelled to pay her the legacy unless she indemnifies him on this account against her husband bringing an action on the promise. Where, however, the husband does sue, it will not be necessary for her to indemnify the heir, but where the woman brings an action after him, she will be barred by a defense, because the dowry has already been paid.

30 PAUL, *Sabinus, book 7:* A dowry given for one marriage cannot be held to serve this purpose in a second marriage, unless they agreed to this; but we always presume that they did want this, unless some agreement to the contrary is proved.

31 PAPINIAN, *Replies, book 4:* Where there is a quarrel but no divorce, a dowry of the same marriage will continue to exist.

32 POMPONIUS, *Sabinus, book 16:* If a husband with his wife's consent sells stone from quarries on dotal land or trees which are not classed as fruits, or the *superficies* of a building, the money received from the sale will form part of the dowry.

33 ULPIAN, *Sabinus, book 6:* If a person outside the family who promised a dowry becomes insolvent, the husband will be to blame for not having sued him, especially if he promised the dowry because he had to, not because he wanted to. For if it was a gift, the husband should be excused for not having pressed the donor for payment, against whom he could have obtained judgment for the amount the donor could pay if he had brought an action, since the deified Pius stated in a rescript that where someone is sued because of his generosity, he should have judgment given against him for the full amount he can pay. But if a father or the daughter herself made the promise, according to Julian in the sixteenth book of his *Digest*, even if a father made the promise, the risk is the husband's; this opinion should not be followed. So the woman must bear the risk; for no judge will listen patiently to a woman who explaining why her husband did not press her father to pay a dowry which he had promised from his own property; still less why he did not bring an action against her. Thus, as Sabinus quite

rightly maintains, where the father or woman herself promised the dowry, the risk is not the husband's; but where a debtor makes the promise, the husband does bear the risk; and where someone else does so as a gift, the party who profits by it bears the risk. However, we take this to mean that profit will accrue to the woman, who gets the benefit of the property.

34 ULPIAN, *Sabinus, book 33:* A mother gave her daughter some gold for her own use; the father then gave the gold as a dowry to the girl's husband, and her mother then died. If the father gave the gold as a dowry without her knowledge or consent, it will remain the property of the mother's heir, and he can bring an action to recover it, and the dowry which is given to the husband is diminished accordingly; because he has been evicted from the property, the husband will have an action against his father-in-law.

35 ULPIAN, *Sabinus, book 47:* Where a husband makes a stipulation about a dowry promised by the father or someone else in order to novate an obligation, the risk becomes his, just as it was previously the woman's.

36 ULPIAN, *Sabinus, book 48:* A woman's debtor, on her instructions, promised to pay the money to her husband who then released him on her instructions. The loss was sustained by the woman. What should we take this to mean? Was it done in order to provide a dowry or for some other reason? The decision seems to have been made with reference to the debtor, who made the promise as a dowry. The underlying question is whether this was done before or after the marriage; since this is held to be very important. For if the release was granted after the marriage took place, when the dowry had already been constituted, the husband makes the loss by releasing the debtor. If, however, this was done before the marriage took place, the dowry is held not to have been constituted.

37 PAUL, *Sabinus, book 12:* The woman does not lose her right of action unless the marriage took place; for if it did not, the debtor remains liable to her.

38 ULPIAN, *Sabinus, book 48:* A point which should clearly be considered is whether the woman will remain liable to her husband if she ordered him to release her debtor. I think she will be liable to an action on mandate, and that this right is converted into a dowry, because the woman is liable on the mandate and consequently, she is held to have made a loss over this; for if she wants to bring an action on dowry, she ought to compensate him for what he did on her instructions.

39 ULPIAN, *Edict, book 33:* If a female slave gives property as if it were a dowry to a male slave, and afterward while they are still together, they both gain their freedom without their *peculium* being withdrawn, and their relationship continues, matters are arranged so that if anything remains of the corporeal property which was given as if it were a dowry while they were slaves, it will be held to have been converted into a real dowry, so that a valuation of it will be due to the woman. 1. Where a woman marries a eunuch, I think that a distinction must be drawn between a man who has been castrated and one who has not, so that if he has been castrated, you may say that there cannot be a dowry; but where a man has not been castrated, there can be a dowry and an action for it, because a marriage can take place here.

40 ULPIAN, *Edict, book 34:* The deified Severus, in a rescript to Pontius Lucrianus, stated: "If a woman who has given a dowry returns to her husband after having been divorced, without the annulment of the marriage contract, the magistrate before whom the case is brought, should have no hesitation in deciding in her favor because she certainly did not intend to return to the marriage without a dowry, and he must carry out his judicial duties on the basis that the dowry has been renewed."

41 PAUL, *Edict, book 35:* Where a dowry is promised, everyone involved is liable, whatever their sex or position. 1. But if the marriage does not take place, an action on stipulation cannot be brought; for the actions rather than the words of the parties are what must be considered. 2. A dowry is also constituted by the release of a creditor granting a release, when a husband, who is a debtor, is released in order to constitute a dowry. 3. Where a dowry is promised subject to a condition by a woman's debtor and afterward, before the husband can claim it, the debtor becomes insolvent, it is settled that the risk is the wife's; for the husband is not held to have accepted the claim at a time when he could not have collected it. But if the debtor was already insolvent when he made the conditional promise, the risk is the husband's, because he is held to have knowingly accepted the claim as it was at the time the obligation was incurred. 4. Where a debtor promises a dowry to a woman and then makes her his heir, according to Labeo, the position is the same as if the woman herself had promised the dowry. Julian also agrees with this view; for he says it would not be fair for judgment to be given against him for money she owes herself, and it is sufficient for her to be freed from liability by a formal release.

42 GAIUS, *Provincial Edict, book 11:* Where property which can be weighed, counted, or measured is given as a dowry, the husband takes the risk, because these things are given for him to sell at his pleasure. When the marriage is dissolved, he must return articles of the same kind and quality, or his heir must do so.

43 ULPIAN, *Disputations, book 3:* Although a dowry may be constituted by the formal release of the husband from debt, if this release was granted before the marriage and the marriage did not take place, according to Scaevola, since it was granted on the basis of a marriage, which did not take place, the release will be void, so that the obligation is still operative. This view is correct. 1. Whenever a third party releases a debtor in order to constitute a dowry and the marriage does not take place, the release will be void, unless it was made because the creditor wanted to make a gift of the whole sum to the woman. For then it must be held that she received it by delivery of something already held and then gave it to her husband. The woman, however, cannot obtain the right to a *condictio* for it by means of a free person. 2. Clearly, if the marriage takes place and is afterward dissolved, the woman will have the right to claim the dowry, unless the third party has formally released the husband from liability, and he himself will have a *condictio* if the marriage is dissolved for any reason; for then the woman will not have an action. On this basis, where a dowry is constituted by the formal release of the husband from liability and the marriage takes place, the result of the claim for the dowry will be that if the obligation from which the husband is released is unconditional, it will not be revived, but a dowry must be provided in accordance with the custom at the time. But where the obligation was limited to a certain time, it will revive, if the time to which it is limited had not elapsed before the marriage was dissolved. If the debt was secured, the security should be renewed. Similarly, if the

obligation which was converted into a dowry is conditional, and a divorce takes place while it is pending, the better view is that the obligation will revive under the same condition. Where the condition was fulfilled during the marriage, the period for demanding payment dates from the day of the divorce.

44 JULIAN, *Digest, book 16:* If a father promised a dowry on his daughter's behalf and emancipates her before the marriage takes place, he will not be released from his promise. Even if the father dies before the marriage takes place, his heirs will still be liable on the basis of his promise. 1. Where a woman has a son-in-power as her debtor and she promises his father a dowry in these terms, "what you owe me, or what your son owes me, will be yours as a dowry," she is not bound, but the result will be that anything she can recover from the father in an action on the *peculium* will become part of her dowry. MARCELLUS. If, after this, she wants to sue either the son or the father, she will be barred by the defense of pact; but if she brings an action on dowry, she can recover whatever is to be found in the *peculium* when the dowry was promised, if it was promised after the marriage took place. But if it was promised before the marriage the *peculium* must be valued at the time when it takes place.

45 TRYPHONINUS, *Disputations, book 8:* Where a woman, who is about to marry a son-in-power, who is her debtor promises as a dowry only the right of action she has for his *peculium*, the amount due to her on this ground at the time of the marriage must be taken into consideration. 1. Where, however, she is about to marry someone else and she directs the son-in-power who is her debtor to promise her dowry out of his *peculium*, the time when the dowry is promised must be looked at in valuing the *peculium*.

46 JULIAN, *Digest, book 16:* Just as a slave acquires property by stipulation for his master, but without his consent, an obligation will be acquired for his master if he allows a dowry to be promised in his master's name. But the master will not be responsible for any risk (if the woman's debtor promises the dowry) or for negligence. A dowry is also constituted by the delivery of dotal property to a slave or a son-in-power, but neither the master nor the father will be liable for risk or negligence. So I maintain that this dowry is at the woman's risk, until either the master or the father ratifies the promise or gift. Thus, during the marriage, the property which was delivered can be recovered by a *condictio*, one, moreover, for an indeterminate amount, so that the party can be released from his promise. 1. If a woman who is about to marry her debtor promises him at dowry in these terms, "what you owe me or the Sempronian estate will be yours as a dowry," whichever one the woman chooses will be her dowry. If she prefers what her husband owes her to be his as a dowry, she has a defense protecting her against him if he brings an action for the estate. If she gives the estate, she

has a *condictio* for the money her husband owes her. 2. Even if a father mistakenly thinks he is indebted to his daughter and promises her a dowry, he will be liable.

47 JULIAN, *Digest, book 18:* Where a slave, who was transferred as a dowry before the marriage, has any property given to him or left to him as a legacy before the marriage, the dowry will be increased by it, just as in the case of the fruits of an estate which was delivered before the marriage.

48 JULIAN, *Urseius Ferox, book 2:* A stipulation in the following terms was made: "Do you promise to pay ten gold pieces as a dowry during next year?" What date should the year be reckoned from, the day the stipulation was made, or the day the dowry took effect, that is, the day of the marriage? The answer was that the year should be calculated from the day of the marriage, because if we held otherwise and the marriage did not take place within the year, the dowry could be considered as due on the basis of this obligation. 1. A father-in-law left a legacy to his son-in-law in these terms: "Let my heir give one hundred gold pieces to Lucius Titius for my daughter's sake." The son-in-law could claim this money, and when collected, it ought to be received as a legacy; but according to Proculus, if a divorce takes place, it must be restored to the woman in an action for dowry, and nonetheless it becomes part of the dowry. JULIAN notes: An action of this kind should not be denied even to a daughter, if she wants to bring it.

49 JULIAN, *From Minicius, book 5:* A man entered into a stipulation with someone for a fixed sum which the latter wanted to give his wife as a dowry, and then released the promisor and he had become insolvent, we must ask whether the money was not collected, because of the husband's negligence. But since the husband did release the debtor, he must surely assume the whole responsibility; for the position is the same as where he had received the money and then donated it to the promisor.

50 AFRICANUS, *Questions, book 8:* A woman had some land as her dowry, and having returned to her husband after a divorce, she made a pact with him to the effect that he would receive ten gold pieces as the dowry and give her back the land. The ten gold pieces were paid, but she died still married before the land was returned. Good faith is involved here and in accordance with the contract, there will be a *condictio* to recover the land, since there was no legal basis for the husband acquiring it. 1. This point will seem clearer by looking at the action on pledge. For if I transfer to you the Cornelian estate as a pledge and then transfer the Titian estate under an agreement that you will restore the Cornelian estate to me, I think there is no doubt whatever that I can quite properly bring an action on pledge against you immediately to recover the Cornelian estate.

51 ULPIAN, *Replies, book 2:* Where property which a father has donated to his emancipated daughter is then given as her dowry with her consent, the dowry is held to be given by the daughter not her father.

52 MARCIAN, *Rules, book 3:* Whenever a husband returns property to his wife in an action for dowry, he must surrender whatever he received in this way, not only where the land given as a dowry has been valued but also where it had not, and where she had promised to pay double damages in the case of eviction, which she need not have done; for this land was included in the dowry.

53 NERATIUS, *Parchments, book 3:* A man wanted to make his wife a gift, and a debtor of hers, who was not solvent, promised her a dowry. The husband will only be responsible to the extent that the debtor was solvent, and if he acquires anything which might allow him to meet his debts, the responsibility will increase in proportion to the amount which he acquired. It will continue to exist even if he afterward becomes poorer, because when the dowry was promised, the gift was only of the money which could not be collected from the debtor, and when he became solvent, the obligation remained valid on account of the gift; for the situation is the same as it would be if the debtor had been in funds at the time when the dowry was promised.

54 GAIUS, *Edict of Urban Praetor, Title on Purchasers of Estates:* Property bought with money from a dowry is held to be dotal.

55 PAUL, *Plautius, book 1:* Where something is promised as a dowry, a verbal guarantor for it is liable.

56 PAUL, *Plautius, book 6:* Suppose someone who owed the slave Stichus to a woman was delegated by her to constitute her dowry and before the debtor paid, Stichus died. Since the debtor was not to blame for not paying and the husband did not delay in taking action, the risk that Stichus might die is the woman's, although even if her husband had not delayed in demanding him, if Stichus had died in his hands, he would not be liable in an action on dowry. 1. The dowry should remain with the person who bears the burdens of marriage. 2. On the death of a father, the burdens of marriage immediately pass to his son, just like the wife and children. 3. When a dowry is said to be reduced at law by necessary expenses, this does not apply where land given as a dowry ceases in part to be dotal, but where the expenses are not refunded, a part of the land, or all of it, can be retained. But where expenses amounting to the value of the land are incurred at different times, according to our Scaevola it ceases to be dotal, unless the woman voluntarily offers her husband the expenses for a year. If the dowry is made up of land and money, and necessary expenses have been incurred because of the land, according to Nerva, they should be deducted from the money in the dowry. What if the woman pays the expenses to her husband? Will the dowry be increased, or will it be held to have been given intact? Where land is involved, the injustice of this would be greater according to our Scaevola; for if it ceases to be dotal, the husband can alienate it. How can money paid in this way become dotal again? Will the money be considered part of the dowry already? The better view is that the land will revert to being dotal, but in the meantime it cannot be alienated.

57 JAVOLENUS, *From Plautius, book 1:* Where a woman is about to marry a son-in-power and promises a dowry to her father-in-law in these terms, "whatever your son owes me will be yours as my dowry," I think it makes a difference whether the son's

obligation, or the right of action against the father on the *peculium* and benefit taken, is included in the promise. For if what the son owes is meant, all the money for which he is liable is included in the promise. But if what the father must pay in the action on the *peculium* or benefit taken is meant, an estimate must be made of how much this was at the time when the promise was made, so this sum can be considered to form the dowry for which judgment can be given against the father on behalf of his son at that point in time. If, however, it is not quite clear which obligation the woman intended, the presumption is that she meant the son's debt, unless the contrary can be clearly shown.

58 CELSUS, *Digest, book 19:* If a betrothal has not yet taken place and you promise a dowry to Titius on behalf of Seia at a time when she refused to marry him but she nevertheless marries him afterward, you will owe the dowry, unless another marriage has taken place in the meantime. 1. Where a woman stipulated with Titus for the female slave Pamphila and then when she was about to marry him, she let him take what he owed her as a dowry; even though Pamphila is not his, would she nevertheless be included in the dowry, and would the woman bear the risk of her death? If the slave has a child, must it be restored to the woman? If the prior stipulation on this remained valid, the child need not be returned. This is so unless it matters whether or not the husband was in possession of the property which he owed at the time when the dowry was constituted. If he was, it could be held that the property itself became his. If he was not in possession, the better view is that he obtained a release from his obligation rather than the property itself, and so the child of the slave is not owed to the woman.

59 MARCELLUS, *Digest, book 7:* If a woman promises a dowry as follows, "ten gold pieces will go to you or Titius as a dowry," she can give it to Titius instead, but her husband will be liable for the dowry, just as if he had ordered it to be given to Titius. There is nothing strange about this, because a woman who is about to promise a dowry to someone can be delegated by him to promise it to someone else, although it is usually held that a woman will not be liable to anyone other than her husband for her dowry. In these circumstances, the dowry is acquired by the husband; for we do not think that she would have made this promise where she was contemplating marriage with Titius instead. 1. When an heir is instituted to a whole estate and is asked to deliver three quarters of it to a woman, and on her instructions, promises her husband what he owes her as a dowry, I do not think he will be bound by this. He will be liable, in delivering the estate, to assign to the woman all rights of action he has and those which lie against him. But he cannot assign these to anyone other than the person to whom he owes them under the *fideicommissum.* Some might say that the husband could bring an action against him for an indefinite amount to get him to pay the estimated amount due under the *fideicommissum.* I cannot agree with this, since it is only fair for the woman's debtor to be liable, if he can receive the amount the husband owes him. But in order for the woman not to be without a dowry, it must be said that part of the estate, which was left to her must be restored under the *senatus consultum Trebellianum,* so that she can give it to her husband as a dowry, since the *fideicommissum* and its burdens are hers. Because of the great subtlety and need in this case, the delegation will have no effect. 2. You gave ten gold pieces as a dowry for a woman who seemed to be free. In this situation, you will have a *condictio* just as you would if you had done this on behalf of a freewoman where the marriage did not take place. If the first woman marries after being manumitted, there will only be a dowry if you

made your presentation with the intention that the property would become a dowry when the marriage took place. So if you gave the property as a gift to the woman, her master will have a *condictio* for it, just as where a woman about to be given something by another person, orders it to be given to her husband.

60 CELSUS, *Digest, book 11:* How much money should a curator allow his ward, an adult woman, to promise as a dowry? The answer was that this depends on her means and the social position of the woman and her husband, as long as the amount is reasonable.

61 TERENTIUS CLEMENS, *Lex Julia et Papia, book 3:* A general curator, or one for the purpose of giving a dowry can be appointed, and where a larger dowry than the woman's assets warrant is promised, the promise will be legally void, because a fraudulent authorization is held to be unconfirmed by the statute. But is the whole obligation invalidated, or only the amount in excess of what should have been promised? It is fairer to hold that only what is superfluous is invalid. 1. The curator in question should deliver the property given as a dowry, but he cannot sell it to someone else and give the price as a dowry. But it is doubtful whether this is correct. What if she cannot contract a respectable marriage unless she gives money as her dowry, and this will benefit her? However, property given as a dowry can often be alienated, and the money used as a dowry. In answer to this question, if the husband would rather have the property as a dowry, there is no longer any problem. But if he refuses to contract a marriage unless the dowry is given in money form, it becomes the curator's duty to appear before the judge who appointed him, so that after proper cause has been shown even in the man's absence, he can allow the dowry to be constituted out of the proceeds of the sale of the property.

62 MODESTINUS, *Replies, book 5:* Titia, while a *minor* under the age of twenty-five, exchanged a quarter of her mother's estate, which she held in common with her brothers, and received some land instead of her share, just as if there had been a sale. She gave this land and some other property as a dowry. If *restitutio in integrum* is granted to her, she receives her share of a quarter of the estate and returns the land, what should her husband do? Should he be content with the other property given as a dowry? If she dies, and her heirs brought an action for *restitutio in integrum* as her representatives, claiming a quarter of the estate while he claims the land, must the husband restore the land and be satisfied with the other property as his profit? Modestinus answered that there is nothing put forward here to justify the dowry being taken from the husband, but the woman or her heirs should have judgment given against them for a fair estimate of the land's value at the time the dowry was given.

63 MODESTINUS, *Advice on Drafting, sole book:* When a stipulation for the return of a dowry is made by a stranger, it operates as soon as a divorce occurs, and the stipula-

tor's right of action is not lost if the marriage is renewed. So the stipulator must consent to the reconstitution of the dowry to prevent the wife not having one for the subsequent marriage, provided this dowry, which someone else stipulated with her permission, does not come from the woman herself for then his consent will not be necessary.

64 JAVOLENUS, *From Cassius, book 4:* If, after a divorce, a husband made no provision for the dowry and the wife marries someone else, then returns to her first husband, the dowry will be tacitly restored to him.

65 POMPONIUS, *Quintus Mucius, book 5:* If some property is left as a legacy or an inheritance to a dotal slave and the testator did not want it to go to the husband, it must be restored to the wife at the end of the marriage.

66 POMPONIUS, *Quintus Mucius, book 8:* If the usufruct of land, which my wife does not own is given to me as a dowry by its owner, there will be difficulties over the return of this right to my wife after a divorce, since we said that a usufruct cannot be assigned by the usufructuary to anyone but the owner of the property; and if it is assigned to a stranger, that is someone who does not own the property, he acquires nothing, but the usufruct reverts to the owner of the property. So some think, quite rightly, that there ought to be a remedy for this in the form of the husband leasing this usufruct to his wife or selling it for a nominal price, so that the right itself will remain the husband's but the power to pick the fruits will belong to the wife.

67 PROCULUS, *Letters, book 7:* Proculus to his grandson greetings. Where a female slave marries and gives her husband money as a dowry, whether she knows she is a slave or not, she cannot make him the owner of this money; it will still belong to whoever owned it before it was given as a dowry to the husband, unless he acquired it by usucapion. She will not be able to change the situation with regard to this money even after she becomes free while living with this man. So she cannot legally bring an action based on her right of dowry or a *condictio* to recover the money even after a divorce; but the person who owns the money can legally claim it. But if the husband usucapted the money by having it in his possession, because, of course, he thought she was free, I am inclined to think that he has made a profit here, provided he began to usucapt before the marriage. I take the same view where he bought something with the money before it became the dowry, so that he was not in possession of it and had not committed fraud in order to avoid possession of it.

68 PAPINIAN, *Questions, book 10:* The promise of a dowry is still valid where the father was originally unaware that the marriage had taken place, if he consents to it afterward because every promise of a dowry is based on the implied condition that there will be a marriage. For where a girl less than twelve years old has been married on the basis that she was older, her husband can claim the dowry when she reaches the age of twelve while living with him. Although it is commonly held that the promise of a dowry is only appropriate for first marriages and that the obligation does not remain

valid, if the woman marries the man to whom she promised the dowry after marrying someone else, it will be operative where another marriage has intervened.

69 PAPINIAN, *Replies, book 4:* Where a divorced woman promises as a dowry lands which have been in her possession for a long time and where her husband is aware of this, the agreement is held to be subject to the implied condition that the dowry which has been promised will not be claimed, and if it is, the wife will have the defense of pact. 1. A woman promised as a dowry money due to her from Seius and the interest which would accrue from it; it is reasonable that any interest accruing after the marriage will form part of the dowry. 2. It was decided that interest on money in a dowry should not be paid after the date of the second marriage where it had been stipulated after a divorce, because the payment of the principal cannot be demanded from that date; but the interest which has accrued in the meantime is due. 3. Where a woman was married and led to her husband's house in his absence, and in the meantime no expenses chargeable to the husband's property have been incurred by her, he cannot honorably demand the return of interest which was promised for the wife's support. 4. A son-in-law stipulated with his father-in-law for the payment of a dowry at a fixed date, without specifying its nature or quantity, but leaving this for the father-in-law to decide. This stipulation is held to be valid, without considering the father-in-law's decision, unlike cases involving land which is not specified. A legacy or a stipulation of land is held to be void here, because there is great difference between constituting a dowry and providing an unspecified piece of property; the amount of the dowry can be fixed on the basis of father's resources and the husband's rank. 5. When a girl has married her tutor's son legally with her father's consent, a dowry can be validly constituted by the tutor on the basis of the girl's resources and rank. 6. Once a patroness has legally promised a dowry on behalf of her freedwoman, she cannot hold it back because the freedwoman turns out to be ungrateful. 7. When property which has been valued and given as a dowry is to be returned at the end of the marriage, the amount involved is declared, but there is no sale. So where the husband is evicted from the property, if the wife gave it in good faith, the husband will have no action against her; otherwise, the action for fraud will be available. 8. Where property has been valued and delivered as a dowry, although the wife continues to have the use of it, title will be held to have passed to the husband. 9. It is settled that the offspring of female slaves given as a dowry will form part of the dowry, and so a pact with the husband to the effect that such offspring are to be held in common between him and his wife is void.

70 PAUL, *Questions, book 6:* Where there is ambiguity, it is better to decide in favor of the dowry.

71 PAUL, *Questions, book 13:* When a stranger promises a dowry on some woman's behalf, the risk is hers. But if her husband pursues the claim and collects the interest, it is held that the risk will be his from then on.

72 PAUL, *Replies, book 8:* A woman gave the whole of her property as a dowry. Must her husband be responsible for her debts like an heir? According to Paul, where someone has all his wife's property on the basis of the dotal promise, he cannot be sued by her creditors, but the promise of the property only covers what remains after the debts have been deducted. 1. Paul says that where dotal property is involved, even the husband's father is liable for fraud and negligence. 2. According to Paul, if a woman gives a dowry from her own property and gets her mother to make stipulations on it, she can alter the dotal instrument afterward.

73 PAUL, *Views, book 2:* The dumb, deaf, and blind are liable where dowries are concerned, because they are able to contract marriages. 1. During a marriage, the dowry can be returned to a wife who is unlikely to squander it for the following rea-

sons: to support herself and her children, to buy some suitable land, to make provision for her father who is in exile or has been relegated to some island, or to relieve her son by another husband, or her brother, or sister who are in need.

74 HERMOGENIAN, *Epitome of Law, book 5:* If a betrothed woman gives a dowry and does not marry or a girl who is under twelve years of age does so in order to be considered a wife, it is held that the privilege which applies to personal actions should be granted here as a favor, based on the *condictio* for a dowry.

75 TRYPHONINUS, *Disputations, book 6:* Although a dowry becomes part of the husband's property, it still belongs to the wife. It has been correctly decided that if she gave land as a dowry which had not been valued and a stipulation for double damages was drawn up over it, where her husband was evicted from it, she can bring an action on the stipulation straight away. Again, as it is not in her interest for anyone to be evicted from the dotal property, and since she is held to suffer from the eviction because of her loss of the dowry, she is held to be entitled to the profits from it during the marriage although the husband owns it and bears the burdens of the marriage.

76 TRYPHONINUS, *Disputations, book 9:* If a father promises a dowry to his daughter *mortis causa*, the promise will be valid; for he will be bound by it as if he had made it at the time of his death. But if he recovers, why should he not be released from the obligation by a *condictio*, as would be the case if someone entered into a stipulation or promised a dowry on someone else's behalf? For the *condictio* on an obligation constituted *mortis causa* is the same as the one for recovering property or money which has been transferred to someone. The same cannot be said of a woman who promises a dowry *mortis causa* because a dowry is void unless it can be used to offset the burdens of marriage.

77 TRYPHONINUS, *Disputations, book 10:* If a woman is about to marry her debtor who owes her money with interest and promises him what he owes her as a dowry, the interest accruing after the marriage takes place does not become part of the dowry, because the whole of the obligation is canceled, as if the debt had been paid to the woman and she had then given it as a dowry.

78 TRYPHONINUS, *Disputations, book 11:* Where a woman who has the usufruct over her husband's land gives it to him as a dowry, although the usufruct is no longer hers, the husband does not obtain it, but gets the use of the land as its owner, and he acquires the full title to the land by means of the dowry. He does not hold the usufruct separately and cannot loose it by nonuse. But on divorce, he must re-establish the wife's usufruct over this land. If, however, she dies during the marriage, the husband is not held to have made a profit out of the dowry, because even if he had not married the woman, when the usufruct came to an end with the death of the usufructuary, the rights involved would revert to the owner, and so he need not contribute to the wife's funeral expenses. 1. It is clear that if a father has a usufruct over land belonging to his son-in-law and gives it to him as dowry for his daughter, and she dies during the marriage, he will have an action for the usufruct on his own account. 2. If a woman consti-

tutes a dowry for her husband by giving him a usufruct over her land, the usufruct will properly speaking be the husband's personally, and he will lose it by nonuse. If this happens, let us see whether the women will still have a dowry. If the woman owns the land and the usufruct reverts to her, nothing now remains of the dowry that can be recovered from him in an action on dowry, because he cannot be blamed for losing the dowry by nonuse, from which she has made a profit; so she will not have a dowry. But if the wife alienates the property and it becomes more valuable without any advantage to her, she will still have a dowry, because the husband who could have enjoyed the usufruct, lost it by nonuse and will be liable for an action on dowry. If he still enjoyed the usufruct up to the time of divorce, its restoration will benefit the woman, because, although it does not become hers immediately, it reverts to her as the owner for a price or some other benefit without any disadvantage to her. But where the husband did not lose the usufruct, his wife's death will not stop it being his. But where a divorce occurs, let us see whether, in the first and second cases, the profits are to be divided in proportion to the part of the year which has elapsed. This is the correct view. Restitution ought to be made in such a way that the usufruct will go to the woman, who owns the land, and it will become part of the title to it. Even if the woman is not the owner of the land, an action on dowry will be available to make the husband give up the usufruct; for the woman will be liable to an action on sale to make her transfer the usufruct, whether she hopes to get a price for it or prefers to give it away for nothing, rather than leave the right where it is with someone who is hostile to her, as she is legally entitled to do. 3. A wife gave her husband a usufruct as a dowry and during the marriage she sold him the land involved. What would she be entitled to recover in an action on dowry after a divorce? I replied that it was important to know how much the land had been sold for. For if a valuation of the bare title had been made, the woman can recover the value of the usufruct in an action for dowry. What if the husband dies before joinder of issue? His heirs would not be liable for anything; for even if someone else was the purchaser of the property, the husband's heir would not be liable to the woman, where the usufruct has reverted to the owner. But if the land was sold in its entirety for what it was worth without the usufruct being reserved, the woman would be held entitled to the dowry during the marriage. 4. Where land held in common was given as a dowry and the other joint owner brought an action for dividing common property against the husband and the land was awarded to him, the dowry will be the amount awarded to the husband by the judgment against the joint owner. But if the land was awarded to a stranger without any bidding, the dowry will be part of the price for which the land was sold. But this would not be held to take the place of the property, and where there is a divorce, it need not be restored all at once, but should be paid within a stated period. But if the land is awarded to the husband, the part given as a dowry will remain dotal. If, however, there had been a divorce, the other part, because of which the first part became the husband's as a dowry must be restored, that is, he will receive from his wife as a price the amount he paid the joint owner under the terms of the judgment against him. If either of them objects that this

is unfair, neither should get a hearing, whether it is the woman who objects to getting the other part of the land or it is the husband who objects to surrendering it. Let us see whether, during the marriage, it is only the part of the land which was given as a dowry which was dotal or whether the other part is dotal as well. According to Julian, only the first part which is dotal and I stated in court that it was only that one which was dotal. 5. Where someone who has a defense mistakenly promises a husband payment of a sum of money as a dowry by stipulation and does not pay, he can be compelled to do so, and he will have a *condictio* against the woman or her father, depending on which of them charged him with a debt which he did not owe but had promised or paid to the husband.

79 LABEO, *Posthumous Works, Epitomized by Javolenus, book 6:* A grandfather gave a dowry on behalf of his granddaughter on his son's side to his son-in-law, then died. According to Servius, the dowry does not revert to her father, and I agree with Servius here, because it cannot be held to come from him, because he did not own any of the property. 1. A father promised one hundred gold pieces on his daughter's behalf as a dowry on condition that it was to be paid "when it was most convenient." Ateius wrote that according to Servius a father ought to pay over the dowry as soon as he could do so without incurring disgrace and *infamia.*

80 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* If a woman's debtor promises a dowry to the man to whom she is betrothed, the woman can bring an action for the money against her debtor before the marriage. According to Labeo, the debtor will not be liable on this ground to the husband afterward. This is not true, because the promise remains in suspense as long as the obligation is in this condition.

81 PAPINIAN, *Questions, book 8:* As a dowry for his daughter, a father gave some money which he had borrowed or received on credit. When this money was spent, the dowry became profectitious.

82 PROCULUS, *Letters, book 5:* Where a woman ordered her husband to give the money he owed her as a dowry for their daughter and he did this, I think we must ask ourselves whether he gave the dowry on his own behalf or on his wife's. If he gave it on his own behalf, he will still owe his wife the money; if he gave it on behalf of his wife, he will be freed from liability to her.

83 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* If a woman's debtor promises a dowry to the man to whom she is betrothed, she cannot bring an action for the money against her debtor before the marriage because the promise is in suspense as long as the obligation remains in this condition.

84 LABEO, *Plausible Views, Epitomized by Paul, book 6:* In cases involving the promise of a dowry, judgment against the person who made the promise ought not to depend on how much he can afford. PAUL: This is always true of a stranger. But where a son-in-law claims the promised dowry from his father-in-law, while their relationship lasts, judgment will be given against the father-in-law for what he can afford. If he sues after the marriage has broken up, I think the amount to be paid will depend on the circumstances and character of the people involved. For what if the father-in-law misled the son-in-law by pretending that there would be a dowry, when he knew that he could not provide one, and he did this in order to trick the son-in-law?

85 SCAEVOLA, *Digest, book 8:* A father gave some land as a dowry for his daughter, who was his sole heir. On being pressed by her father's creditors, it seemed better to sell the dotal land, because it was less profitable and keep other pieces of inherited land with larger yields. The husband agreed, as long as there was to be no deceit

involved. Could the part of the dowry consisting of this land be lawfully transferred to the woman during the marriage? The answer was that it could, if its price was paid to a creditor.

4

DOTAL PACTS

1 JAVOLENUS, *From Cassius, book 4:* Pacts can lawfully be made after marriage, even if they have not been entered into beforehand. 1. Pacts on the return of the dowry should be entered into by everyone who can sue for a dowry or be sued for one, so that a pact will be of no advantage in proceedings before the judge hearing the case to someone who was not a party to it.

2 ULPIAN, *Sabinus, book 19:* Where it has been agreed that the dowry will remain the husband's however the marriage ends provided there are children, Papinian replied to Junianus the praetor that where the marriage was terminated because of the husband's death, it should be held that there was no agreement on the retention of the dowry here. If they had agreed this, the pact should not be observed as being prejudicial to the dowry, where the husband's death occurs.

3 PAUL, *Sabinus, book 3:* Pacts entered into referring to the time of divorce are inoperative if no divorce takes place.

4 ULPIAN, *Sabinus, book 31:* If it is agreed to make profits into a dowry, will the agreement be valid? According to Marcellus, in the eighth book of his *Digest*, such an agreement is not valid; for a pact like this gives a woman hardly any dowry at all. But he makes a distinction here. If a woman gives some land as a dowry on condition that her husband returns the profits to her, such a pact is void. And the position is the same where she gave him a usufruct as a dowry subject to a pact of this kind. But if they reach agreement on the return of the profits, so that any profits which have been obtained will form part of the dowry, and the land or the usufruct is delivered, not on the basis that such land or its profits becomes dotal, but on the understanding that he collects the profits of the dowry in the future, he can be compelled by an action on dowry to return the profits. These profits will be part of the dowry, and he can enjoy the interest that can be obtained from them as well as from the principal. I think that the intention behind the giving of the dowry is important, so if the wife gave a large dowry because she wanted the profits to form part of the dowry and the husband is content with the interest which can be collected from the profits, this agreement can be considered valid, since the dowry is not held to be profitable dowry. Imagine an annual return of forty to him who did not receive the sum as dowry, unless this had been agreed, plus three hundred. Certainly he would consider he had acquired such a rich dowry as a benefit. What if there is a pact to the effect that the husband can turn these profits into a dowry and that the wife must maintain and support herself and her family and pay all her own expenses? How could you say that such an agreement was not valid?

5 PAUL, *Sabinus, book 7:* An agreement not to bring an action for misconduct or to vary the amount which can be claimed cannot be made, otherwise private pacts would remove the right to public punishment. 1. Pacts of this type should not be observed where they bar an action for the recovery of gifts or property which has been unlawfully removed, because one invites women to steal, the other violates the civil law. 2. An agreement not to bring an action for necessary expenses should not be observed because these expenses reduce the dowry by law.

6 ULPIAN, *Edict, book 4:* According to Pomponius, a husband cannot enter into a pact excluding liability for everything but fraud in connection with the dowry, a rule which is clearly for the benefit of married people. But he can enter into a pact that he will not be responsible for the claim of a debtor who has promised the dowry. For according to him, he can enter into a pact putting the dowry at his wife's risk, or on the other hand, he can accept the risk in connection with a dowry which would otherwise be his wife's.

7 POMPONIUS, *Sabinus, book 15:* When a dowry is given on a daughter's behalf, it is best for the son-in-law to enter into a pact with both parties, although when the dowry is first given, the donor can impose any condition he likes without considering the woman's position. But if he wants to enter into a pact with both parties, although when the dowry is first given, the donor can impose any condition he likes without considering the woman's position. But if he wants to enter into a pact after the dowry has been given, both parties must be considered in the process. Since the dowry has already been acquired by the woman. If in these circumstances the father enters into a pact without his daughter or if he does so alone or in conjunction with his daughter, the pact will only injure or benefit him; if the daughter acts on her own, it will not benefit or injure him. But if the daughter alone enters into a pact which is of advantage to her father, both she and her father will benefit, because a father can acquire property by means of his daughter, but a daughter cannot do so through her father. But where the pact entered into by the daughter is injurious, although the pact will be injurious to her interests, it will not affect her father in any way, unless he brings an action in conjunction with his daughter. A daughter can never adversely affect her father's position by entering into a pact, and if she dies during the marriage, the dowry will revert to her father.

8 PAUL, *Sabinus, book 7:* When a son-in-power marries where his father is insane or has been captured by the enemy or when a daughter-in-power does so, there is no alternative to entering into a pact on the dowry with these people themselves.

9 POMPONIUS, *Sabinus, book 16:* Where there is an agreement that if a daughter dies during her father-in-law's lifetime, the whole of her dowry is to be given to him, or if he is dead, his son, or if he is dead as well, the father-in-law's heir, such a stipulation can be upheld as valid by liberal interpretation.

10 POMPONIUS, *Sabinus, book 26:* A grandfather, who had undertaken to provide a dowry for his granddaughter, entered into a pact that the dowry could not be reclaimed by him or his son, but could be reclaimed by any of his heirs other than his son. The son will be protected by the defense of pact, since we are allowed to provide for our heir and there is nothing to prevent us from doing this for any certain person, if he is to be the heir. But this does not apply to the other heirs. Celsus also maintained this view in his writings.

11 ULPIAN, *Edict, book 34:* Where a father promised a dowry and entered into a pact that it would not be reclaimed by him during his lifetime or as long as the marriage lasted, the deified Severus decreed that the pact should be construed as if in the words "in his lifetime" had been added. For this is to be understood as referring to paternal affection and the wishes of the parties, so that the second part of the agreement will be held to apply to the lifetime of the father. A different view would separate the profits of the dowry from the burdens of marriage, which would be most improper; it would result in the woman being held to have had no dowry. So the result of this rescript was that if the daughter died during her father's lifetime, or was divorced without fault on her part, the dowry could not be reclaimed at all; but if the father died while the marriage lasted, it could be reclaimed.

12 PAUL, *Edict, book 35:* If a father gave a dowry and entered into a pact that if his daughter died during the marriage, the dowry should remain the husband's, I think the pact should be observed, even if they have no children. 1. Some of the pacts which are usually entered into before marriage are voluntary, as for example, one

which states that a woman will support herself with the promised dowry and while the marriage lasts she will not claim the dowry, or that she will provide a fixed sum for her husband and be supported by him in return, and other similar provisions. Other pacts operate by law, such as those about when a dowry can be reclaimed and the way in which it is to be returned. Here the wishes of the contracting parties are not always observed. But if it is agreed that the dowry cannot be claimed at all, the woman will have no dowry. 2. Where a woman enters into a pact that no more than half of her dowry can be claimed from her and she stipulates for a penalty, according to Mela, she should be content with one of two things: either a defense of pact and release of the obligation and its penalty, or if she sues on the stipulation, she ought to be denied the defense. 3. Where land which has been valued is given as a dowry and the woman enters into a pact that if it brings any more when sold, the surplus will become part of the dowry, according to Mela, the pact must be observed. Similarly, she can agree, on the other hand, to be liable for any loss if the land fetches less. 4. If a wife enters into a pact that whether the land sells for more or less than its valuation, the price will form part of her dowry, this pact ought to be upheld. But if the property fetches less, because of the husband's negligence, the wife can recover from him.

13 JULIAN, *Digest, book 17:* Again, if the land is not sold, he will have to pay its valuation.

14 PAUL, *Edict, book 35:* As regards the time when the dowry is to be returned, the law allows a pact to be made fixing the time of its return, provided this does not adversely affect the woman's position,

15 GAIUS, *Provincial Edict, book 11:* that is, that it can be returned sooner.

16 PAUL, *Edict, book 35:* An agreement to return the dowry at a later date is invalid, as is one saying it is not to be returned at all.

17 PROCULUS, *Letters, book 11:* Atilicinus to his friend Proculus, greetings: "A pact was entered into between a man and his wife before marriage that, on divorce, the same period should be allowed for returning the dowry as was given for providing it. The woman gave her husband the dowry five years after the marriage took place. On divorce should the husband return the dowry to his wife within five years or within the period prescribed by law?" Proculus replied: "As regards the time for returning the dowry, I think that a pact can only improve a woman's position and not adversely affect it. So if the pact provides for the return of the dowry within a shorter period than the law prescribes, it ought to be upheld; but if it involves a longer period, the pact is invalid." It is proper to mention in connection with this opinion that if the pact provides for the same delay in returning the dowry on divorce as there was in delivering it after the marriage, and if the delay in returning it was shorter than the prescribed one, the pact will be valid. If the delay is longer, the pact will not be valid.

18 JULIAN, *Digest, book 18:* Although there can be no agreement between a husband and wife extending the period for the return of the dowry while the marriage lasts, on divorce such an agreement should be kept, if there was a good reason for it.

19 ALFENUS, *Digest, Epitomized by Paul, book 3:* The position is different where a father promises a dowry on his daughter's behalf, on the basis that it will be delivered by him in one, two, three, four, or five years and he agrees to return the dowry within the same period at the end of the marriage. This pact will be valid if the daughter becomes her father's heir and was present at the time the pact was made.

20 PAUL, *Edict, book 35:* A pact on gifts or the unlawful removal of property or on expenses will be valid, that is, after a divorce. 1. Where a stranger is about to give a dowry from his own property, he can enter into any kind of pact or stipulate for anything he wants, even without the woman's knowledge, since he is imposing conditions on his own property. But after he has given the dowry, he can only enter into a pact with the woman's consent. 2. If there is an agreement that the dowry cannot be claimed from the woman or her father, their heir will not have a defense. But if the agreement was that it was not to be claimed during the marriage while the father was alive, it can be collected immediately after his death. If the husband does not claim it, he will be liable for negligence if he could have collected it, provided that the marriage had not broken up before he had the right to claim it.

21 JULIAN, *Digest, book 17:* If a woman promises a fixed sum as a dowry and instead gives some slaves on condition that they are at her risk and any children they have are to be hers, this pact should be upheld. For it is settled that an agreement can be made between husband and wife which provides that a dowry consisting of a sum of money can be converted into property, if it is of advantage to the woman.

22 JULIAN, *Urseius Ferox, book 2:* A man received land from his wife as a dowry and they agreed that the husband would give the rent from this land to his wife as an annual income. He then leased the land to his wife's mother, at a fixed rent, for cultivation. She died with the rent still owing, leaving her daughter as sole heir. On divorce, her husband brought an action against her for the rent which her mother owed him. It was decided that she should not be granted a defense, "as if an agreement had not been made between her and her husband that the rent was to be given to her for her maintenance," since gifts between husband and wife can sometimes turn out to be valid, and money given as an annual income is a kind of gift.

23 AFRICANUS, *Questions, book 7:* When a father gave a dowry on his daughter's behalf, he entered into a pact that if she died leaving one or more children, the dowry should be returned to him with a third of it deducted, or after his death, that it should be given to one or other of the children in his power. Then a stipulation was made to this effect. After his death, the woman had died during the marriage leaving children. Could the children claim their two-thirds in the dowry on the basis of the stipulation? I replied that they could, because the effect of the stipulation was that if the woman died during the marriage, her dowry should be returned to her father. The position is held to be the same as where a stipulation was made like this: "If a ship arrives from Asia, do you promise that I or after my death Lucius Titius will be paid a certain sum?" If the ship arrives after the stipulator's death, the money will be due to the heir.

24 FLORENTINUS, *Institutes, book 3:* If there was a pact between a man and his wife that a specified part of the dowry, or the whole of it, should be kept if there were one or more children, the agreement is valid even where the children were born before the dowry was given or increased. It is sufficient that they are the children of the marriage for which the dowry was given.

25 ULPIAN, *Replies, book 1:* As regards the return of the dowry, where it was agreed to give it back if the girl died during the marriage, it is also held that there is an agreement not to sue for it. And the father has acquired the defense of pact which he can transmit to his heir.

26 PAPINIAN, *Replies, book 4:* A father-in-law and his son-in-law agreed that if the daughter died leaving a boy one year old, the dowry would belong to the husband. But

if the child were to die during his mother's lifetime, the husband was only to keep a part of the dowry where the wife died during the marriage. The woman and the one year old child died in a shipwreck. Since it was more likely that the infant died before its mother, it was decided that the husband could keep a part of the dowry. 1. A husband can keep a dowry which was given on the basis of a pact on a daughter's behalf, and if he does not do so by mistake, it is quite correctly held that the daughter who is her father's sole heir and heir to part of her mother's estate, has a preferred claim in an action for division to the dowry wrongly paid by her father. 2. Where a father-in-law and a son-in-law agree that if a daughter dies during the marriage and there are no children, the dowry is to be returned to the father, the parties should be understood to have agreed that if the daughter dies and there are children, the dowry is to be kept, and no part of it is to be removed because of any addition made to it where there is no subsequent agreement to the contrary. 3. There was an agreement that a wife was to be transported at her husband's expense wherever she went. So, keeping to the letter of the pact, the woman looked for him in the province where he was serving as a centurion. If he did not keep to the agreement, no direct action will lie, but an *actio utilis in factum* will be given. 4. A daughter promised a dowry on her own behalf and provided that if she died during the marriage without leaving any children, her dowry should be paid to her mother. The daughter's pact here does not confer any right of action on the mother. But if the daughter's heir pays the money in the dowry to the mother, a defense will be available to her which will prevent the husband claiming it in contravention of the pact. 5. A father stipulated for the dowry to be given to him if his daughter died while she was married. During the marriage, he was convicted of a capital offense. The condition in the stipulation would not operate if there was a divorce or the death of the husband ended the marriage. If, however, the woman died during the marriage, the imperial treasury acquires the action on dowry based on the stipulation. But if the parties remarry after a divorce, the stipulation will not benefit the imperial treasury, even where the daughter died during the second marriage, since it applied to the first marriage.

27 PAPINIAN, *Definitions, book 1:* If a woman who has children pretends to return to her husband after a quarrel, for example, where she agrees to go without a dowry out of motives of financial gain, this agreement should be rejected as contrary to sound morals, according to the way the parties have behaved.

28 PAUL, *Questions, book 5:* Where a woman enters into a pact either before or after marriage that her creditor will be satisfied from the profits of the land she gave as a dowry, will the pact be valid? I say it will if it is entered into before the marriage, and it will reduce the dowry. But if it is done after the marriage, since the profits of the dowry are meant to relieve the burdens of marriage, the husband would be agreeing to satisfy the creditor out of his own property, and thus will be a mere gift.

29 SCAEVOLA, *Replies, book 2:* A husband received some lands which had been valued as a dowry and with the intention of deceiving his wife, he entered into a pact during the marriage to the effect that the lands should not be held to have been valued, so that he could reduce their value without any risk to himself. Will the lands still be valued in accordance with the earlier dotal estimate, and will they be at the husband's risk? I replied that the pact would not be rendered invalid by the facts in question, because it was entered into during the marriage, provided the dowry has not become less valuable. But if the lands become less valuable after the pact was made, an action on dowry will be available on this ground. 1. Titius gave a dowry on a woman's behalf and made a stipulation on it about death or divorce. On divorce, Titius died without having claimed the dowry. The woman renewed her marriage with the heir's consent. Could he claim the dowry on the basis of the stipulation? I replied that

Titius's heir would be prevented from doing so by a defense of pact, if he had agreed that the amount he could have recovered on the stipulation would become a dowry where the parties to the marriage were reconciled. 2. A woman who gave property as a dowry entered into a pact that if she died during the marriage, it should be returned to her brother and he made a stipulation here. At her death the woman left some dotal property to her husband as a legacy and manumitted some slaves who were part of the dowry. Was the husband liable to the brother for the property which the woman left in the legacy and the slaves which she manumitted? I replied that there was nothing here to show why he should not be liable, since the heirs as well as the legatees of the deceased are liable for manumissions.

30 TRYPHONINUS, *Disputations, book 10:* Baebius Marcellus promised Baebius Marullus one hundred gold pieces as a dowry for his daughter, and they agreed not to claim the dowry during the marriage, or if the daughter died during the marriage without leaving any children after her father's death, half the dowry was to remain the property of Marullus, and the other half was to be returned to the woman's brother; these things were set out in a stipulation. Marcellus died leaving a son and a daughter having left the whole dowry to his daughter. Marullus divorced his wife by whom he had a daughter and the woman died, having appointed her brother and her daughters heirs to equal shares of the estate. Marullus then brought an action before Petronius Magnus, the praetor, against Marcellus's son and her for the whole dowry on the basis of the promise. He alleged that there was an agreement between the two parties that if the woman died without leaving any children, part of the dowry was to remain the husband's, and that this really meant that the whole dowry was to be his if the woman had a son or a daughter. On the other hand, it was held that a defense based on the common pact was also of assistance to the heir. But in the situation outlined, since the heir was, as it were, the representative of the deceased woman, he could not protect him with the defense of pact. If, however, he himself had been sued for the dowry while the woman was alive, he might have used this defense against Marullus, because there had been a divorce and he still had this defense even after the death of his sister. So it was decided that he was to be released from liability for this claim, but that there was nothing in this opinion to prevent a claim on the *fideicommissum*, under which Marullus was entitled to half of the estate as his wife's heir by succession to his daughter.

31 SCAEVOLA, *Questions, book 3:* If a husband and wife agree that the profits of the last year of the marriage, which have not yet been collected, are to be hers a pact of this kind is valid.

32 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* A wife gave her husband land valued at one hundred gold pieces as a dowry and then entered into a pact with him that he would return the land to her for the same price on divorce. The husband later sold the land for two hundred gold pieces with his wife's consent, and then there was a divorce. According to Labeo, the husband should be entitled to pay her two hundred gold pieces or return the land, whichever he wishes, and he should not be released from the pact. I think Labeo gave this answer because the land had been sold with the wife's consent; otherwise, it would certainly have to be returned. 1. If a father promises a certain sum of money as a dowry for his daughter and there is a pact that he is not to be forced to pay it against his will, I think that there is nothing which anyone can demand from him, because a thing which cannot be demanded from someone against his will is not considered to be covered by the law of dowry.

5

DOTAL LAND

1 PAUL, *Edict, book 36:* The *lex Julia* on dotal land is not applicable at times. If a husband does not make any provision for threatened damage and a neighbor is granted *missio in possessionem* over the dotal land, and then is directed to take possession of it, the neighbor here does become its owner because the alienation is not voluntary. 1. But even land which passes by universal succession to someone else, as is possible, for example, in the case of the husband's heir, it will do so subject to the same condition that it cannot be alienated.

2 ULPIAN, *Adultery, book 5:* Where the husband becomes a slave, is his owner unable to alienate this land? I think this is the better view. So if it is confiscated by the imperial treasury, there can still be no sale, even though the imperial treasury is always a suitable successor and is always solvent.

3 PAUL, *Edict, book 36:* Land left in a legacy to a slave who is part of the dowry is covered by the *lex Julia* as being dotal. 1. Whenever a wife is entitled to an action on dowry or such an action could be brought in some way, the land involved cannot be alienated.

4 GAIUS, *Provincial Edict, book 11:* The *lex Julia* which applies to dotal land and provides that a husband cannot encumber or alienate it, ought to be widely interpreted so as to cover a betrothed man as well as a husband.

5 ULPIAN, *All Seats of Judgment, book 2:* According to Julian, in the sixteenth book of his *Digest,* a husband cannot lose a servitude over this land or impose any other ones on it.

6 ULPIAN, *Adultery, book 5:* But exemption from a servitude over urban dotal land cannot be granted, as this might cause deterioration in the condition of the property.

7 JULIAN, *Digest, book 6:* If a husband acquires land belonging to Titius which is subject to a servitude for the benefit of the dotal land, the servitude becomes confused, and here the husband will pay whatever damages the court assesses. But where the

husband is not solvent, *actiones utiles* will be granted to the woman against Titius for the restoration of the servitude. 1. When, however, a woman gives as her dowry land for the benefit of which there is a servitude over an estate belonging to her husband, it becomes his without the servitude, so that any rights over this land cannot be said to have been lost because of the husband's actions. What, then, is to be done? It is the duty of the judge dealing with the matter of the dowry to direct that the land be restored to the woman or for her heir and the servitude re-established.

8 ALFENUS, *Digest, Epitomized by Paul, book 3:* A man at his wife's request cut down an olive grove on dotal land in order to replace it with a new one. The man then died, leaving the dowry to his wife as a legacy. He replied that the wood which had been cut from the olive trees should be returned to the woman.

9 AFRICANUS, *Questions, book 8:* If a woman promises her husband, who is her debtor, the land he owes her as a dowry, the land becomes dotal. 1. Where she promises him either the land or the ten gold pieces which he owes her, he can choose which of them is to be the dowry. 2. But if the husband owed Stichus some land and promised him what he owed as a dowry, on Stichus's death, the land will be the dowry. 3. He says that it follows from all this that if the Cornelian or the Sempronian estate was promised to the debtor as a dowry, whichever he chooses would be the dowry. It is clear that if one was to be alienated, the other could not be. If, however, he later buys the other one back after alienating it, he would still have the power to alienate the one he had kept if he wanted to.

10 PAUL, *Questions, book 5:* Therefore, the scope of this statute is indefinite, because the obligation was dotal. So where the husband was able to alienate one piece of land, could he also alienate the other because he had the right to buy the first one back, even if this has not yet been done? Or should this not be allowed in case neither of them ends up as a dowry? It is clear that one of them will be held to have been lawfully alienated if the other was bought back afterward.

11 AFRICANUS, *Questions, book 8:* Where land given as a dowry is valued so that the woman has a choice, he said that the land cannot be alienated. The opposite is true, however, if it depends on the husband's wishes.

12 PAPINIAN, *Adultery, book 1:* Even if the marriage breaks down, the land is still considered dotal. 1. The consent of a father-in-law to the sale of dotal land has no effect.

13 ULPIAN, *Adultery, book 5:* We must take dotal land to include both urban and rustic land; for the *lex Julia* covers every kind of building. 1. The term "land" also applies to a part of any estate, so whether the whole of an estate or only part of it has been given as a dowry it cannot be alienated. We are still bound by this rule. 2. We take the expression "dotal land" to mean land which the husband has actually acquired as owner; it is only then that the prohibition on alienation operates. 3. A wife's heir is given the same assistance as the wife herself. 4. If a wife is appointed her husband's heir and the dotal land is left as a legacy, where the woman receives after the deduction of the legacy an amount from the estate equal to the value of her dowry, the

legacy will be valid. Will it be valid if the amount received is less? Scaevola says some, if not all of it can be recovered; if a certain amount is lacking to make up the dowry, only the quantity needed to supplement the deficiency in the dowry will remain the woman's.

14 PAUL, *Adultery, book 3:* If a woman who was about to marry Titius transferred the land with his consent to Maevius as a dowry, the position as regards the dowry will be the same as if she had transferred it to Titius himself. 1. Where someone gives some land as a dowry on a woman's behalf, it becomes dotal, since it is held to become the husband's on account of his wife. 2. If a husband owes his wife land belonging to someone else and his wife promises it to him as a dowry, it will be in suspense and will become dotal when it is his. 3. Where a woman rejects land which has been left to her in a legacy as a dowry, or if she fails to accept an inheritance or a legacy where her husband was a substitute, the land will be dotal.

15 PAPINIAN, *Replies, book 3:* It has been decided that dotal land which the husband continued to possess after he had sent letters to his wife in which he declared that the land was not dotal any longer can be kept by the husband when the wife dies during the marriage, because she would not have an action on pact.

16 TRYPHONINUS, *Disputations, book 11:* If a woman gave her husband land as a dowry which Titius possessed in good faith and which he could claim was his on the basis of long-term possession, and her husband failed to claim the land when he could have done so, he does this at his own risk. For although the *lex Julia*, which forbids the alienation of dotal land, applies to this kind of acquisition, it does not interrupt long-term possession, where the period began to run before the land was made dotal. It is clear that if there are only a few days to go before long-term possession can be established, the husband will not be responsible at all.

17 MARCIAN, *Digest, book 7:* A husband sold and delivered dotal land. If his wife died during the marriage and the dowry enured to the husband's benefit, the land cannot be taken from the buyer.

18 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* A husband opened marble quarries on dotal land. Where there is a divorce, who owns the marble which has been extracted but not yet removed? Should the wife or the husband bear the expenses incurred in quarrying? According to Labeo, the marble belonged to the husband, but he said that nothing need be paid to the husband by the wife, because the expense was not necessary and the value of the land had been reduced. I think that useful expenses as well as necessary ones should be paid by the wife, and I do not think the value of the land has been reduced, if the quarries were of the kind that the amount of stone in them could increase. 1. If a delay is caused by a wife where there was a pact that she was to receive the land after paying the valuation of part of it to her husband, according to Labeo any profits in the meantime belong to the husband. I think the better view is that the husband should receive a proportionate share of the profits and the woman should get back the rest. This is the rule we apply.

BOOK TWENTY-FOUR

1

GIFTS BETWEEN HUSBAND AND WIFE

1 ULPIAN, *Sabinus, book 32:* As a matter of custom, we hold that gifts between husband and wife are not valid. This rule is upheld to prevent people from impoverishing themselves through mutual affection by means of gifts which are not reasonable, but beyond their means.

2 PAUL, *Sabinus, book 7:* And people might not have as great a desire to educate their children. Sextus Caecilius added another reason, that a marriage would often break down where the husband had property but did not donate it, and so the result would be that marriage would become a matter of purchase.

3 ULPIAN, *Sabinus, book 32:* This explanation is also drawn from an oration of our Emperor Antoninus Augustus; for it says: "Our ancestors prohibited gifts between husband and wife in the belief that true affection was based on the heart alone. They also took into account the reputation of the parties to the marriage in order to prevent the agreement appearing to have been made for money and to stop the more generous partner becoming poorer and the less generous one richer." 1. Let us see which kinds of people are prohibited from exchanging gifts. If a marriage takes place in accordance with our customs and laws a gift will not be valid. But a gift will be valid if there is an impediment which prevents the marriage taking place at all. So if a senator's daughter marries a freedman in contravention of the *senatus consultum* or if a provincial woman marries someone who holds office there in contravention of the mandate on this, the gift will be valid because the marriage is void. But it is not right for gifts of this kind to be valid or for those who are guilty of an offense to benefit from them. However, the deified Severus in the case of a freedwoman of Pontius Paulinus, a senator, gave a different decision because the woman was not shown the affection due to a wife, but was treated as a concubine instead. 2. Those in the power of the same person cannot make gifts to one another, for example, a husband's brother who is in the power of the father-in-law. 3. We use the term "power" not only of children but also of slaves, since the better view is that those who are subject to the husband under any rule of law cannot make gifts here. 4. So if a mother makes a gift to her son who is in the power of his father, the gift will have no effect since he acquires it for his father. But if she gives it to her son when he is about to leave for military service, then it is held to be valid because it is acquired by the son and becomes part of his *peculium castrense.* So if a son or a stepson or anyone else who is subject to the husband's power makes a gift out of his *peculium castrense,* it will not be void. 5. Thus, a person in

the power of his father-in-law is not allowed to make gifts to the wife and daughter-in-law, provided the husband is in the power of his father. 6. The wife and daughter-in-law are also forbidden to make gifts to a husband and son-in-law. Again, where a gift has been made to those who are in the power of the same person or who exercise this power over them, the gift will not be valid, provided the husband and father-in-law are in the power of the same person or the husband is in the power of the father-in-law. But where the husband belongs to another family, there is no prohibition against a gift to the father-in-law or anyone in his power or subject to him. 7. There is no prohibition against gifts between a mother-in-law and her daughter-in-law or vice versa, because parental power is not involved here. 8. If my slave over whom someone else has a usufruct makes a gift to my wife out of his *peculium* which does not belong to me or a freeman who is acting as my slave in good faith does this, will the gift be valid? In the case of the freeman, a gift can be allowed in some circumstances, but other people do not have the right to alienate the *peculium* as a gift. 9. It is not just a husband, a wife, and certain other people who cannot make gifts on their own behalf; they cannot get others to do this for them either. 10. Remember that gifts between husband and wife are prohibited, the effect of this rule being that any transaction involved is completely void. So if property is donated, its delivery will not be valid, and if a promise is made to someone by stipulation or if a formal release is granted, the transaction will be void. For this rule says that any transaction entered into by a husband and his wife which involves a gift will have no effect. 11. If, then, a husband gives money to his wife, it will not be held to be hers, because clearly no property passes to her. 12. But if he directs his debtor to pay her, will the money become hers and will the debtor be released? Celsus in book 15 of his *Digest* asks whether it may not be said both that the debtor is freed and that the money becomes the husband's property, not the wife's. For if the gift had not been prohibited by civil law the result of the transaction would have been that the money passed to you from your debtor, and then from you to your wife. But because of the short time between the two actions, one of them is obscured. There is nothing new or strange in your receiving what you obtain from someone else; for if a man who pretends to be your creditor's procurator receives money from your debtor on your instructions, it is settled that you will have an action for theft and that the money is yours. 13. This follows from the view taken by Julian; for he says that if I order someone who is about to give something to me to give it to my wife, the transaction will be void; for the position would be held to be the same as if I had received it myself and when it became mine, I had given it to my wife. This opinion is correct.

4 JULIAN, *Digest, book 17:* The same is true where I tell someone who is about to make a gift *mortis causa* to me to make it to my wife, and it does not make any difference whether the donor dies or recovers. If we say this gift is valid, do not imagine that I will not lose anything by it, since, if the donor recovers, I will be liable to a *condictio*; if he dies, I cease to have the property which I would have had among my possessions because of the gift.

5 ULPIAN, *Sabinus, book 32:* Where a man who intends to make a gift to his betrothed delivers it to Titius so that he can give it to his betrothed and Titius delivers after the marriage takes place, if the husband used him as an intermediary, the gift made after the marriage will not be valid. But if it was the woman who used him and the gift had already been made some time ago, that is, before the marriage, although Titius delivered it after the marriage had taken place, the gift will be valid. 1. Where a husband has two debtors, Titius and his wife, and he releases his wife as a gift, neither of them will be freed from liability, because a formal release is not valid here. Julian also says this in the seventeenth book of his *Digest*. Clearly, if you assume that Titius has been released, he himself will be freed from liability, but the woman will remain under an obligation. 2. Generally, any transaction involving a gift between them, people connected with them, or their intermediaries should not be held valid. If the affair is a mixed one, involving people or property unconnected with them, where the components cannot be separated, the gift will not be prohibited. If they can be separated, the other parts will be valid but not the gift. 3. Where a husband orders his debtor to promise the money owed to his wife, this will have no effect. 4. Where a wife in order to make a gift to her husband promises to pay his creditor and provides a verbal guarantor for this, according to Julian the husband will not be freed from liability, and the wife and her verbal guarantor will not incur any obligation; so the situation will be the same as it would have been if she had not made any promise. 5. Julian also says, in connection with sales, that where property is sold for less than its value, this will have no effect. But according to Neratius (whose view Pomponius does not reject) a sale between husband and wife for the purpose of making a gift will only have no effect if the husband did not intend to sell the property at all, but pretended to sell it so as to make a gift of it. For if he did intend to sell it and remitted part of the price to her, the sale would be valid; but the remission will not be to the extent of the woman's enrichment. So if property which is worth fifteen gold pieces is sold for five and is now worth ten, the woman must refund five gold pieces, because she is held to have made this as a profit. 6. If a wife or a husband fails to use a servitude in order to make this a gift, I think the servitude will be lost; but on divorce it can be recovered by a *condictio*. 7. Where a wife or husband chooses not to use a certain defense in order to make a gift, the decision made by the judge granting acquittal will be valid, but a *condictio* can be brought against the recipient of the gift. 8. A gift for purposes of burial is allowed; for it is agreed that a wife can give her husband a burial ground or vice versa; and if anyone is interred there, it makes the ground religious. This arises from the fact that something is only usually termed a prohibited gift where it makes the donor poorer and enriches the recipient. So here a person is not held to be enriched by property dedicated to religious ends. The fact that she would have bought the property if she had not received it from her husband does not change this. For even if she would have made a loss if her husband had not given her it, she is not enriched because she did not have this expense. 9. This leads on to the proposition that if a husband gives his wife property for burial purposes, it will only be considered hers when a body is interred in it. Before it becomes religious, it is still the donor's property. So if the woman sells it, it will remain the donor's ground. 10. It follows that if a husband gives his wife a tomb of great value which has not been used, the gift will be valid, but only when it will become religious. 11. If the woman herself is buried there, although

the marriage ends with her death, the ground will be held religious as a favor to her. 12. So if a husband gives his wife something as an offering to a god or land on which she had promised to erect a public building or dedicate a public temple, the place will become sacred. If he gives her something to be given or consecrated to a god, there is no doubt that the gift will be valid. So if he provided her with oil to be used in a temple, the gift will be valid. 13. Where a husband is made an heir and refuses the inheritance so as to make his wife a gift, according to Julian in the seventeenth book of his *Digest*, the gift is valid. For a person is not made poorer by failing to acquire an inheritance, but by giving property from his own estate away. The refusal of the husband benefits his wife, if she is a substitute or will be an heir on intestacy. 14. Similarly, if a husband refuses a legacy, we hold that the gift is valid if the woman is substituted as a legatee or if you suppose that she was appointed as heir. 15. If someone is asked to restore an inheritance to his wife after deducting a certain amount for himself and he restores it without doing this, according to Celsus in the tenth book of his *Digest*, the husband is held to have been extremely conscientious in carrying out his duty under the *fideicommissum* rather than to have made a gift. Celsus adds a good reason for this view, that many people think they are discharging their duties under the *fideicommissum* rather than giving anything away and they do not consider themselves to be handing over anything which is theirs when they give back more of his property than the deceased intended. Not unreasonably, we often think the deceased wanted something, and yet he did not actually ask for it to be done. There is even more reason for this view where a man was asked to restore an estate and did not deduct a quarter of it but fulfilled the terms of the trust completely wtihout taking advantage of the provisions of the *senatus consultum*. He did genuinely discharge the *fideicommissum*, carrying out the wishes of the deceased. This is the case so long as he did not make an error in his calculations. But there is no doubt that he will have an action for the recovery of money which was not due under the *fideicommissum*. 16. So where payment is not made out of their property, a gift is quite rightly held to be valid; for it is valid whenever the person making the gift does not diminish his assets; and the gift will still be valid even if it does diminish his property, as long as the recipient is not enriched by it. 17. Marcellus asks in the seventh book of his *Digest* whether the gift will be valid where a woman received money from her husband and spent it on trivialities for one of her relations. He says it will be valid since the woman is held not to have been enriched by it any more than if she had borrowed the money in order to pay a relative's debts. 18. As regards gifts which are prohibited by civil law, a gift can be revoked, and if the property involved still exists, it can be reclaimed from the man or woman to whom it was given. If it has been consumed, a *condictio* will lie to recover the amount by which either of them was enriched.

6 GAIUS, *Provincial Edict, book 11:* Because property which is retained on the basis

of a gift which is not permitted by law is held to be retained without cause or without just cause, and a *condictio* will be available here.

7 ULPIAN, *Sabinus, book 31:* What point in time is relevant in deciding whether people have been enriched, the time when issue was joined or when judgment was given? The time when issue was joined is the relevant one and our emperor and his father stated this in a rescript. 1. If a husband gives his wife money to buy perfumes and she pays the money to his creditor and then buys perfumes with her own money, according to Marcellus in the seventh book of his *Digest*, she will not be held to have been enriched by this. He also says that if he gives her a dish for the same purpose and she keeps it and buys perfumes with her own money, he will not be able to reclaim it, since she is not enriched by it, as she spent the same amount on something perishable. 2. If a man and his wife give each other five gold pieces and the man keeps his but the wife spends hers, it was quite rightly held that there was a set-off between the gifts, and the deified Hadrian decreed this to be so. 3. Where a woman bought land and her husband paid the price for her as a gift, he also decreed that an estimate should be made of the extent to which the woman was enriched. So if the land is worth very little now, we must hold that its value when issue was joined is to be considered here. Clearly, if the land is very valuable, only the amount which was paid must be restored, not the interest on the price. 4. A neat point arises for discussion where a woman buys land for fifteen gold pieces and the husband does not pay all of the price but only two thirds of it, that is, ten gold pieces, and the wife pays five herself. Where the land is only worth ten now, how much can the husband recover? The better view is that he can recover two thirds of the ten and that the husband and wife should share the loss on the price. 5. Where a husband says that he has increased the value of property which he received as a dowry at valuation and has done this as a gift, our emperor and his deified father gave a remedy here in a rescript which stated: "As you state that the value of the property was increased as a gift, the judge hearing the case will decide that if you refuse some of the money you must return the land having deducted reasonable expenses." So the husband can choose what he prefers here. The same rule applies if the woman complains of a drop in its value. The principle is the same as is usually observed where property is lent for use after valuation, according to Pomponius in the fourth book of his *Readings*. 6. Where a wife buys land from her husband which he received as a pledge for the dowry and this sale can be considered to have been made as a gift, it will have no effect. But our emperor and his father stated in a rescript that the pledge will still be operative here. I give the wording of the rescript to show that a sale carried out in good faith between husband and wife cannot be annulled afterward. "If a husband sold you pledges for the dowry and money which was lent to him and this was done in good faith without any intention of making a gift, the transaction will be valid. But if it is shown that this was done as a gift and so the sale becomes invalid, you will still have your legal rights under the pledge." 7. If a wife buys something and her husband pays for it, it is sometimes said that all of

it can be recovered from the woman since she has been enriched by the whole transaction, just as where a woman buys something and her husband frees her from her debt to the seller. What difference does it make whether he pays her creditor or the seller? 8. A man gave his wife a slave on condition that she manumitted him within a year. If the woman did not obey his instructions, does the *constitutio* of the deified Marcus give him his freedom whether the man is alive or dead? According to Papinian, the *constitutio* will not be applicable and he is quite right; since the opinion of Sabinus has been accepted, that the slave only becomes the property of the recipient when the gift of freedom becomes operative and so the woman cannot manumit him after the specified time even if she wished to do so. The husband's intentions cannot make it applicable, since he could have manumitted the slave himself. I also agree with this view, since neither the seller nor the donor wishes to or can impose a condition on himself; but he can do this to the person who receives the slave. So he is still the owner and the *constitutio* does not apply. 9. A gift made for the sake of manumission is valid even if freedom is not to be granted immediately but at some other time. So if a husband gives his wife a slave to be manumitted at some fixed period, the slave only becomes hers at the same time as she manumits him at the end of this period. Thus, if he is manumitted before then, this will be invalid. Note also that if someone gives his wife a slave to be manumitted within a year and she does not manumit him within the year, manumission after that time will be void.

8 GAIUS, *Provincial Edict, book 11:* If the marriage ends by death or divorce before the slave is manumitted, the gift will fail; for it is held to be a condition of the gift that he was to be manumitted during the marriage.

9 ULPIAN, *Sabinus, book 32:* If a husband gives his wife a slave on condition that he is never granted his freedom, a gift like this is completely void. 1. Where a woman manumits a slave after receiving money from him or imposes services on him, according to Julian the law allows the imposition of these services, and the obligation will be valid. The woman is not held to have been enriched at her husband's expense, because the slave promised these services as a freedman. But if a woman receives money as payment for the manumission and manumits him because of it, where he paid the money out of his *peculium*, it will remain the husband's property; but if anyone else paid it for him, it will become the woman's. This opinion is quite correct. 2. Gifts *mortis causa* can be made between husband and wife,

10 GAIUS, *Provincial Edict, book 11:* because the operation of the gift extends to a time when they cease to be husband and wife.

11 ULPIAN, *Sabinus, book 32:* But in the meantime, the property does not become the recipient's straight away, but only when death occurs. So during the intervening period it remains the donor's. 1. The point made about the validity of gifts *mortis causa* between husband and wife is true in the sense that according to Julian, it is not just a gift made with the intention that the property is to pass to the wife or husband when death occurs which is valid, but any kind of gift *mortis causa*. 2. So when the gift is not retroactive, difficulties arise, as Marcellus points out in the following example. A husband wanted to make a gift *mortis causa* to his wife, and she used a son-in-power as an intermediary to receive the gift and deliver it to her. When the husband

died, the son became the head of a household. Is the delivery valid? He says it must be held valid because the son became independent at the time when the delivery was made, that is, when the husband died. 3. Marcellus also says that he knew that according to Sabinus, where a husband delivered property to his wife who was a daughter-in-power, the gift with all its advantages would be hers if she became independent during the husband's lifetime. Julian approved of this view in the seventeenth book of his *Digest.* 4. So if a wife gives property *mortis causa* to her husband while he is a son-in-power and he becomes independent, we have no hesitation in holding that it will become his. 5. But, on the other hand, if a wife makes a gift *mortis causa* to her husband when he is the head of a household and at the time of her death he has become a son-in-power, the whole benefit of the gift will pass to the father. 6. Consequently, according to Scaevola in his note on Marcellus, if a woman uses a slave as an intermediary in the delivery of a gift *mortis causa* to her and he gives the property to the woman while he is a slave and then becomes free at time of death, the same must be held to apply. 7. Marcellus also holds that if an intermediary dies after he has given property to the woman while the donor is still alive, the gift will fail, because it has to become the intermediary's for a period of time and then pass to the woman. This is the case where the woman to whom the property is given uses an intermediary, not the donor. For if the husband used an intermediary, the property becomes his straight away and if he delivers it before the death of the husband and then dies himself, the delivery would be valid but in suspense until the death took place. 8. If a wife gives property to Titius so that he can deliver it to her husband *mortis causa* and on her death Titius delivers it to the husband against the wishes of her heirs, the outcome depends on whether Titius was used as an intermediary by the woman or by the husband as the recipient of the gift. If it was the wife, who used him, he will be liable to a *condictio,* where he delivered the property to the husband. But if it was the husband who used him, on the wife's death, title to the land immediately vests in him as the husband's intermediary, and the husband will have an action against him. 9. If a wife transfers property which she has received from her husband *mortis causa* to anyone else while the husband is alive, the delivery will be void, because the property does not become hers until the last moment of his life. Clearly, in cases where it is settled that the gift is retroactive, a delivery made by the wife will be in suspense. 10. If a husband makes a gift *mortis causa* to his wife and then a divorce takes place, will the gift fail? According to Julian, the gift will be void and not dependent on a condition. 11. He also says a gift made in consideration of divorce is valid,

12 PAUL, *Sabinus, book 7:* as long as this is made at the actual time of divorce, and not in contemplation of a divorce at some future time.

13 ULPIAN, *Sabinus, book 32:* But if death does not take place, the property will not be held to be the woman's, because the gift has been made with another situation in mind. 1. So if a husband makes a gift *mortis causa* to his wife and suffers deportation, we must see whether the gift will be valid. It is held that the gift is valid in the case of deportation just as it would be where a divorce occurs. So as marriage is not dissolved by deportation and the woman is not to blame, it is only humane that a prior gift *mortis causa* should be confirmed by exile of this kind, just as it would be valid if the husband died. But this is true only to the extent that the husband cannot be deprived of his right of revocation, because it is necessary to wait for his death to know for certain whether, when he was taken from this world, he had returned or was still subject to his punishment. 2. Where someone receives property so that he can build on his own ground, a *condictio* does not lie against him because he is held to have received a gift. This was also the view of Neratius who says that when property has been given for building a house on, or as sowing land, since the recipient does not intend to do any-

thing else with it, it will fall within the category of a gift. Thus, gifts of this kind between husband and wife are prohibited.

14 PAUL, *Edict, book 71:* If a husband gives his wife money to rebuild her house, which had been burned down, the gift will only be valid up to the amount needed for reconstructing the house.

15 ULPIAN, *Sabinus, book 32:* What is left over from the sum a husband gives to his wife annually or monthly can be revoked if it is excessive, that is, more than the dowry can afford. 1. If a husband gives his wife money and she collects the interest from it, she is enriched. Julian states this in the eighteenth book of his *Digest* where he is dealing with husbands.

16 TRYPHONINUS, *Disputations, book 10:* What if out of a sum of one hundred gold pieces which a husband gave his wife, fifty of them are lost in the hands of his debtor and the wife has the other fifty doubled by interest? The husband cannot recover more than fifty from her on the basis of the gift.

17 ULPIAN, *Sabinus, book 32:* As regards fruits, let us see, whether a woman is enriched by the fruits of land which had been given to her and if they form part of the gift. According to Julian, the fruits as well as the interest are permitted as a gift. 1. Where a slave who forms part of a gift acquires property, it will belong to the donor.

18 POMPONIUS, *Readings, book 4:* If either the husband or the wife has the use of slaves or clothes belonging to the other, or lives in the other's house for nothing, this is a valid gift.

19 ULPIAN, *Sabinus, book 32:* If a wife gives a slave to her son, who is in her husband's power, and the slave shall have acquired a female slave, she will belong to the wife. According to Julian, it makes no difference whose money was used to buy the female slave, because the recipient of a gift cannot acquire property by means of a slave who was given to him, even from the slave's own acquisitions; for this privilege is only given to possessions in good faith. Here, however, the man knows the slave belongs to someone else. 1. He also asks if the female slave was bought with the husband's money, does the husband have a defense against the wife's action on dowry which will allow him to keep the price? According to Marcellus, the husband does have a defense against an action on dowry, and according to Julian, if he pays it, he has a *condictio* to recover the money.

20 JAVOLENUS, *Letters, book 11:* If a slave, who was given *mortis causa* to a wife, enters into a stipulation before the husband dies, I think the obligation will be in suspense until the husband dies or is no longer expected to die, this being the reason for the gift. If either of these events which will annul or confirm the gift takes place, they will also confirm or invalidate the stipulation.

21 ULPIAN, *Sabinus, book 32:* Where a husband pays the tolls a wife incurs during a journey, can he recover them on the ground that she was enriched by them, or is this not a gift? I think the better view is that this is not prohibited, especially if she set out on the journey for his sake. According to Papinian in the fourth book of his *Replies*, a husband cannot recover the tolls paid by his wife or her servants where the journey was for his sake. A journey is held to have been made for the husband's sake when his wife comes looking for him. It makes no difference whether there has been an agreement on marriage about tolls or not; for a person who meets necessary expenses is not making a gift. So if the wife made the journey with her husband's consent and she had reasons of her own which made it necessary where the husband gave her something

for her expenses, it cannot be recovered. 1. If a wife promises her husband a dowry with interest, it is undoubtedly the case that that he can sue for the interest, because this is not a gift, since the interest is claimed to meet the expenses of the marriage. What if the husband remits the claim against his wife for them? This is the same as asking whether the gift is prohibited; and Julian says it is, which is correct. Clearly, if there is an agreement that the wife is to support herself and her slaves, and he allows her to use her dowry to maintain herself and her slaves, there will be no problem. For I do not think that he can claim what has already been set off from her as a gift.

22 ULPIAN, *Sabinus, book 3:* A man gave his wife a slave *mortis causa* and then appointed him his heir with a grant of freedom. Is this appointment valid? I think that if he appointed him his heir because he had changed his mind about the gift, the appointment will be valid and the slave will become his master's necessary heir. But if he appointed him as his heir and then gave him away, the gift will prevail, or if he appointed him before giving him away, he did so without intending to deprive him of his freedom.

23 ULPIAN, *Sabinus, book 6:* Papinian quite rightly thinks that the oration of the deified Severus only applies to gifts of property. So if the husband bound himself by stipulation on his wife's behalf, he thinks the husband's heir cannot be sued even if the husband dies without changing his mind.

24 PAUL, *Sabinus, book 7:* Where a gift between strangers is made, but they marry before title has vested by possession for the statutory period, or if, on the other hand, a gift is made between husband and wife and before the above-mentioned time has elapsed the marriage breaks up, it is settled that the period of prescription continues to run in its favor, because in one case possession has been transferred without any defect, and in the other the original defect has been removed.

25 TERENTIUS CLEMENS, *Lex Julia et Papia, book 5:* If during the marriage someone else's property is given by a husband to his wife, the wife can continue his usucapion immediately, because even if he had given it to her *mortis causa*, this does not prevent her usucapion. For the law applies to gifts which enrich the wife and make the husband poorer. So even if it was not a gift *mortis causa*, it will be held to be a gift between strangers, which can be acquired by usucapion because it belongs to someone else.

26 PAUL, *Sabinus, book 7:* If I order someone who has sold me property to give it to my wife as a gift and he transfers possession of it to her on my instructions, he will be free from liability, because, although at civil law she is not held to possess it, it is clear that the seller has nothing which he can deliver. 1. According to Neratius, the same reasons which allow gifts between husband and wife also allow those between father-in-law and son-in-law or daughter-in-law. So a father-in-law can make a gift to his son-in-law in expectation of death or divorce and a son-in-law can make one to his father-in-law in expectation of death or divorce.

27 MODESTINUS, *Rules, book 7:* A gift between people who are about to marry before marriage is lawful, even if the marriage takes place on the same day.

28 PAUL, *Sabinus, book 7:* If property which has been donated is destroyed or consumed, the donor must bear the loss. This is reasonable because the property still belongs to the donor and he loses his own property. 1. Where a husband incurs any expense because of the children of female slaves forming part of the dowry, whether it is for their instruction or support, he cannot recover it, because he is using the slaves himself. But he can recover money given to their nurse for bringing them up, because he is giving something to preserve their lives, just as if he ransomed slaves forming part of the dowry from robbers. 2. Where the husband's slaves have performed services for the wife or vice versa, the better view is that no account is to be taken of them. Indeed, the law applying to prohibited gifts should not be interpreted as if they

do not love each other and are hostile, but as between people united by the greatest affection and merely afraid of poverty. 3. If a woman buys a slave for ten gold pieces and these have been given to her by her husband, where the slave is worth five, according to Plautius, only five gold pieces can be claimed. If he dies, nothing can be claimed. But if the slave was worth fifteen gold pieces, no more than ten can be claimed because the donor only became poorer by that amount. 4. But what if the woman bought two slaves with the ten gold pieces, and one of them dies but the other is worth ten? According to Pomponius and many others, the answer depends on whether the slaves were sold at a single price or for separate amounts. If they were sold at one price, the whole of the ten gold pieces can be claimed, as where a purchase deteriorates or a flock or fleet of wagons is sold and a part of it is destroyed. But if they were sold separately, only the price of the surviving slave can be claimed. 5. According to Pomponius, Julian took the view that where a wife acquires property by means of a slave whom she bought with money given by her husband, whether it is a legacy, an inheritance, or the children of female slaves, the husband can claim it on this ground. 6. It is settled that if a wife, before receiving her annual income from her husband, spends any of his money or money she has borrowed, she is held to have spent this out of her annual income. 7. According to Celsus, it was quite rightly decided that if a wife stipulated for annual interest on her dowry, although the interest is not due, because the agreement was for annual payments, they cannot be claimed by an action on dowry, but their claims can be set off. So we hold that the same rule applies to any pact made on annual payments.

29 POMPONIUS, *Sabinus, book 14:* If a woman sells a slave bought with money which has been given to her and then buys another one, according to Fulcinius, the woman bears the risk of the second slave. This is not true, even if the second slave was not bought with her husband's money. 1. Where a husband gives his wife wool and she makes herself clothes out of it, according to Labeo, the clothes belong to the wife.

30 GAIUS, *Provincial Edict, book 11:* But an *actio utilis* is available to the husband.

31 POMPONIUS, *Sabinus, book 14:* But if a husband makes clothing for his wife out of his own wool, although this is done for the wife and out of concern for her, it will still belong to the husband. The fact that the wife helped in the preparation of the wool here and acted on her husband's behalf in it makes no difference. 1. Where a wife uses her own wool to make women's clothes on her own behalf with the help of her husband's female slaves, the clothes will be hers, and she will owe her husband nothing for the slaves' work. But if men's clothes are made on behalf of her husband, they will be his if he paid his wife for the wool. But where the wife did not make men's clothes on behalf of her husband but gave them to him, the gift will not be valid, since it is only valid if they were made on her husband's behalf, and he will not be able to sue for the cost of the work done by his female slaves. 2. If a husband gives his wife a building-site so that she can build a block of apartments on it, there is no doubt that the block will belong to the husband. But it is settled that the woman can have the expenses she incurred. For if the husband claims the block as his, the wife can retain the expenses. 3. If there were two slaves each worth five gold pieces, but both of them were sold for five by a husband to his wife or vice versa as a gift, the better view is that they will be owned jointly in proportion to the price. For the important question is not what the slaves are worth, but how much of the price has been remitted as a gift. There is no doubt that the husband and wife can buy property from each other for

less than it is worth if they do not intend to do this as a gift. 4. If a husband sells property to his wife for its true value or vice versa, and so as to make a gift, they enter into a pact that the seller will not guarantee the property, we must see exactly what the agreement on the sale says. Is the property to pass, in which case the whole transaction will be valid, or is the pact alone to be void, as is the case if, after the sale, this pact was made because of a change of mind? The better view is that only the pact is invalid. 5. We hold that the same is true where the parties, in order to make a gift, enter into a pact that the seller need not give a guarantee against the slave running away or wandering off, that is, that any actions under the edict of the aediles or the contract of sale will be unaffected. 6. The money a man owes his wife, which is payable at a certain time, can be paid at once without fear that it will be considered a gift, although by keeping it for the agreed period he might have had the advantage of using it. 7. Where you are about to leave me property as a legacy or because you have made me your heir, you can leave it to my wife if I ask you to, and this will not be considered as a gift, because my property is not diminished. According to Proculus, the main reason why our ancestors came to a donor's assistance here was to prevent one of the parties losing his property because of his love for the other, not to prevent out of spite, as it were, one of them from being enriched. 8. If a husband gives his wife an excessively valuable present on the Kalends of March or on her birthday, this is a gift. But if he pays the expenses which a wife incurred to maintain herself in a better way, the opposite is true. 9. A wife is not held to have been enriched if she spends the money given to her on banquets, perfume, or food for her slaves. 10. Provisions which a husband supplies for his wife's slaves or horses which are used by them both cannot be recovered by a *condictio*. But if he supports his wife's household slaves or those she keeps for sale, I think that the opposite rule applies.

32 ULPIAN, *Sabinus, book 33:* This was the legal position on gifts between husband and wife, as we have previously stated, when our Emperor Antoninus Augustus, before the death of his father the deified Severus, proposed in his oration to the senate during the consulships of Fulvius Aemilianus and Nummius Albinus that the senate should relax the strictness of the law to a certain extent. 1. The oration of our emperor on the confirmation of gifts applies not just to property obtained by a husband on his wife's behalf but also all gifts made between a husband and a wife. So by law the property belongs to the person to whom it was given, gives rise to a civil obligation, and comes within the scope of the *lex Falcidia* where this is appropriate. I think that this statute will apply because the property which is given is, as it were, confirmed by will. 2. The oration says: "It is proper for a person who made a gift to change his mind, but it would be hard and miserly for the heir to seize the property when this would perhaps be contrary to the last wishes of the person who made the gift." 3. We should take this to mean a change of mind at the last moment. For if he made a gift to his wife, then changed his mind, and afterward changed it again, the gift is valid, as we examine his last wishes, just as we usually do as regards *fideicommissa* or when we deal with the defense of fraud in connection with legacies, because a man's wishes are changeable up to the last moment of his life. 4. But where the donor only changes his mind once, we allow his heir the right of revocation if it is quite clear that the deceased changed his mind. But if there is any doubt, the judge should tend to confirm the gift. 5. If a husband pledges the property he gave, we hold that he has changed his mind, although the property still belongs to him. What if it was his intention that the gift should remain valid? Suppose that the property remained in the woman's possession as *precarium* and she was ready to satisfy the creditor. The gift

must be held valid. For if he gave her the pledged property which he intended to be a gift right from the start, I would say that the gift is valid; so if the woman is prepared to satisfy the creditor, she will have a defense of fraud. Indeed, if she does satisfy the creditor, she can use the defense of fraud to have any rights of action assigned to her. 6. If the donor becomes the slave of a private person, the gift is not held valid, but fails, although slavery is like death. So if the woman who received the gift becomes a slave, the gift will fail. 7. If a husband made his wife a gift and killed himself because of some crime on his conscience or if he is convicted after death, the gift will be revoked, though gifts which he made to other people will be valid if he did not make them *mortis causa*. 8. If a husband who is in the army makes a gift to his wife out of his *peculium castrense* and is then convicted of a crime, it will be valid because he will be allowed to make a will covering property of this kind (provided he has made his will before being convicted). For a person who can make a will can also make a gift *mortis causa*. 9. The oration says: "has consumed," and we should take this to mean that the person who received the gift has not been enriched by it. If, however, this has happened, he can take advantage of the oration. But if he has not been enriched and has given the same amount as the other party, if the one who was enriched died, the other can recover what he gave and need not set off what he has consumed, although where a divorce takes place, a set-off of this kind can be made. 10. If a divorce occurs after the gift was made or if the person who received the gift died first, the old law applies, that is, that the gift will be valid if the husband wants the wife to have it, but if he does not, it will fail. For many married people separate on good terms with each other, and many with feelings of anger and hatred. 11. What if a divorce takes place and then the marriage is re-established and the donor either changes his mind after the divorce or does not when the marriage is re-established and the donor dies during the marriage? It can be maintained that it will be valid. 12. If there is no divorce, but only a mild disagreement, when the disagreement is over, the gift will be valid. 13. Where a wife and her husband have lived apart for a long time, but keep up the appearance of being married to each other (which, as we know, sometimes happens where people of consular rank are concerned), I think that gifts will not be valid here, just as if their marriage had continued; for marriage is constituted by marital affection, not cohabitation. But where the donor dies first, the gift will be valid. 14. What if both parties, the donor and the recipient of the gift, are captured by the enemy? First, I want to deal with the following point. The oration meant a gift to have no effect if the recipient has died beforehand. So what if both parties die in a shipwreck, the collapse of a building, or a fire? Where it can be established which of them died first, the question is easy to answer, but if this cannot be established, the question becomes a difficult one. I tend to think that the gift will be valid and maintain this on the basis of these words in the oration: "if the recipient of the gift dies first." But when they both die at once, the recipient cannot be held to have been the first to reach the end of his life. So the gifts they made to each other are quite rightly held to be valid if, having made these gifts, they die at the same time, because although neither one survived the other, the oration did not envisage the death of both of them together. But when neither of them

survived the other, their mutual gifts will be valid. For as regards mutual gifts *mortis causa*, a *condictio* cannot be granted to either party, and so their heirs profit by these gifts. Accordingly, if both parties are captured by the enemy at the same time and both die in captivity at different times, must we look at the date of their capture in order to say whether their gifts are valid, just as if they had both died at once? Or is neither gift valid, because the marriage ended during their lifetimes? Or shall we see which of them died first, so that the gift is not valid in his case? Or whether one of them returned home, so that his gift is valid? My view is that where the parties do not return, the date on which they were captured is the relevant one, just as if they had died then. But if one of them returns, he must be held to be a survivor because of this. 15. When a husband leaves some of the property he has already given away as a legacy but not all of it, he is not held to have objected to the rest becoming his wife's, since people often leave something as a legacy at first and then give it away, or there may have been some other reason for the legacy. 16. The oration refers not just to husband and wife but also others who cannot make gifts because of a marriage, for example, where a father-in-law makes a gift to his daughter-in-law or vice versa, or a father-in-law makes one to his son-in-law or vice versa, or one between fathers-in-law where the parties to the marriage are in their power; for the spirit of the oration allows all these people to make gifts as well. This was also the view of Papinian in the fourth book of his *Replies* where he says: "A father-in-law made a gift to his daughter-in-law or his son-in-law, then his son or daughter died during the marriage." Although there is still a flaw in the gift, if the father-in-law did not question it, the provisions of the oration will be held to operate against his heirs after he dies; for the same reason which prohibits the gift demands that its benefit is granted. So in order to make a gift of this kind valid, Papinian requires the son of the person who made the gift to die before he does and the father-in-law afterward without having changed his mind. 17. Where a son-in-power who has a *peculium castrense* or a *peculium quasi-castrense* makes his wife a gift, we must look at the son himself and his death. 18. If a daughter-in-law makes a gift to her father-in-law, see whether she died and whether her intentions remained the same up to the end. But where her father-in-law dies first, we hold that the gift will fail. But if the husband lives and survives his wife, should we admit that the gift is valid? If the husband becomes his father-in-law's sole heir, a second gift can be said to have been made for the husband's benefit so where one ends, the other begins. Where he is not his father's heir, the gift will be invalidated for another reason. 19. If a father-in-law breaks up his daughter-in-law's marriage, it will be void, although the marriage continues where the husband and wife are in agreement on this, as the rescript of our emperor and his father states. But the marriage is over as far as the parties between whom the gift was made are concerned. 20. So if two fathers-in-law make gifts to one another, the same rule will apply where they break up the marriages of their children against their will, and a gift between them is invalid. But where a gift of this kind is made between fathers-in-law, the one who made the gift must die during the marriage and with his parental power still operating for it to be valid. The same applies to those in their power. 21. Where one father-in-law makes a gift to another and one or both of them emancipate the parties to the marriage, the gift is not like the ones mentioned in the oration and so is invalid. 22. If a man makes a gift to his betrothed which is to take effect on marriage, although the gift is not held to be one between a husband and his wife and the terms of the oration do not apply to it,

it does come within the spirit of the oration, so that if his intentions remain unchanged up to the time of death, it will be valid. 23. A gift will take effect whether the property was actually given or an obligation was released, for example, where a man releases his wife from liability for what she owes him as a gift. The release itself is not in suspense, but its effect is. Generally, all of the gifts which we said were prohibited will be valid by means of the oration. 24. Where a partnership is formed between a husband and his wife as a gift, it is void in accordance with the ordinary rule, and a liberal construction of the *senatus consultum* cannot be held to grant the benefit of an action on partnership although the property they hold in common for an agreed purpose cannot be revoked. So an action on partnership will not be available, because a partnership is void if it is the pretext for a gift even where other people are involved, so this is also true of a husband and his wife. 25. The same is true of a sale which is really a gift, since it will be void. 26. Clearly, if property is sold for less than it is worth so as to make a gift of it, or if the price is remitted afterward, we must admit that the gift is valid in accordance with the *senatus consultum*. 27. If a man was betrothed to someone and then married her where this was illegal, are gifts made during the betrothal as it were valid? Julian deals with this question by considering a *minor* of twelve years of age who had been brought to her would-be husband's home when she was too young to marry, and he says she is his betrothed but not his wife. But the better view is the one held by Labeo, myself, and Papinian in the tenth book of his *Questions*, that if the betrothal preceded the marriage, it will continue to exist although the man who married the girl thinks she is his wife already. If it did not precede the marriage, there is no betrothal as it did not take place and no marriage, because it could not take place. So where the betrothal came first the gift is valid, but if it did not, it is void because the man did not make the gift to a stranger as it were but to his supposed wife, and so the oration will not apply. 28. But if a senator is betrothed to a freedwoman or a tutor to his ward or any of the other people who cannot marry are involved, will a gift made during betrothal, as it were, be valid? I think we should reject these betrothals and the property which was given should be seized from the people involved and claimed by the imperial treasury, since it is not proper for them to have it.

33 ULPIAN, *Sabinus, book 36:* If a wife stipulates for an annual payment from her husband, she cannot bring an action on the stipulation during the marriage. But if, while the marriage lasts, the husband dies, I think that because the gift involves an annual payment, the stipulation can be enforced under the *senatus consultum*. 1. On the other hand, if a wife agrees to pay her husband something every year, this can be recovered, and she can claim the rest as hers. I think she can also bring a *condictio* for the amount by which the husband is enriched, because the annual payment a husband pays his wife is not as important as the one a wife pays her husband; for this is inconsistent with and contrary to the nature of her sex. 2. If the husband stipulated with the wife for annual payments and the wife dies during the marriage, the gift will become valid under the oration.

34 ULPIAN, *Sabinus, book 43:* If a wife gives property to her husband and he presents it as a dowry on behalf of their daughter, or after the husband has received the gift, she allows him to give it as a dowry for their daughter, a generous view can be taken to the effect that even though the prior gift is not valid, the presentation of the dowry will be valid because of the wife's subsequent consent to it.

35 ULPIAN, *Edict, book 34:* If a divorce does not take place with the appropriate legal formalities, gifts made after the divorce are void, since the marriage cannot be held dissolved.

36 PAUL, *Edict, book 36:* If property which has been donated is still in existence, it can be claimed. But because a gift involves possession, if the property is not restored, a full valuation of its worth should be made and a guarantee against eviction given to the possessor for its value. This was also the view of Pedius. 1. A man sent a ring belonging to someone else as a gift to his betrothed and after the marriage gave her one of his own instead. According to some, including Nerva, this ring became her property, because they held that the gift which had already been given was confirmed, not that a new one had been made. I think this view is correct.

37 JULIAN, *Digest, book 17:* If a woman committed fraud to prevent the preservation of property given to her by her husband, he can bring an action for production or damage to property against her, especially if she did this after divorce.

38 ALFENUS, *Digest, Epitomized by Paul, book 3:* A slave owned jointly by a husband and his brother gave a slave boy to the brother's wife. He replied that the gift presented by the slave was not valid as far as the share belonging to the husband was concerned. 1. The same rule applies where one of three brothers has a wife and gives her property held jointly by them; for a third of the gift will not belong to her. But as to the remaining two thirds, if the brothers knew they were being given or ratified it afterward, the woman need not return them.

39 JULIAN, *From Minicius, book 5:* A husband who wanted to give some money to his wife allowed her to make a stipulation with his debtor. She did this, but before receiving the money, she divorced her husband. Can he recover the entire amount, or will an action on the promise be void because of the gift involved? I replied that the stipulation will be ineffective. But if the promisor pays the woman in ignorance of the facts and the money has not been spent, the debtor can claim it. But if he is ready to assign his rights of action to the husband, he will be protected by the defense of fraud, so the husband can claim the money in the debtor's name. If, however, the money is gone and the woman has been enriched by it, the husband can claim it; for the woman is held to have been enriched by having received money from her husband, because the debtor can protect himself by means of a defense of fraud.

40 ULPIAN, *Replies, book 2:* Where property is given to a husband by his wife so that he can acquire public office, the gift will be valid to the extent required to provide him with the office.

41 LICINIUS RUFINUS, *Rules, book 6:* For the Emperor Antoninus decreed that a wife could give property to her husband for his advancement.

42 GAIUS, *Provincial Edict, book 11:* Another basis for a gift has been introduced recently by means of the indulgence of the Emperor Antoninus, which we call gifts for the sake of honor, for example, where a wife makes a gift to her husband to allow him to seek admission to the senatorial or equestrian orders or so that he can put on games.

43 PAUL, *Rules, sole book:* A gift can be made between husband and wife in contemplation of exile.

44 NERATIUS, *Parchments, book 5:* If a stranger gives property belonging to a husband to his wife and both are ignorant of the position and where a husband does not know that he has given his own property, the woman can lawfully usucapt it. The same rule will apply where someone who is in the husband's power believes himself to be the head of a household and makes a gift to his father's wife. But if the husband discovers that the property was his before usucapion occurs, he can claim it, and here possession will be interrupted although he does not want this and the woman learns it is his, because this turns into a gift made by the husband. Where the woman is aware

of the facts, the better view is that there will be nothing to stop her acquiring title to the property, since women are not absolutely prohibited from acquiring their husbands' property, but only where the property has been given by them as a gift.

45 ULPIAN, *Edict, book 17:* According to Marcellus in the seventeenth book of his *Digest*, he can even remove the property without causing damage to his wife or without fear of the *senatus consultum* which gives a remedy to those who have had property removed for sale.

46 ULPIAN, *Edict, book 72:* There can be no gift of possession between a husband and his wife.

47 CELSUS, *Digest, book 1:* Whether the husband has incurred expenses while acting as his wife's unauthorized agent or carrying out his duties as a husband is a question of fact not law. An inference based on the amount and character of the expenses will be easy to draw.

48 CELSUS, *Digest, book 9:* Whatever a husband gives his wife remains his, and he can claim it. It does not make any difference if he has been left large legacies by his wife.

49 MARCELLUS, *Digest, book 7:* Sulpicius to Marcellus. A woman who wanted some land to go to their son, who was in his father's power, after the father's death, transferred it to the father so that he could leave it to the son after he died. Do you think the gift is to be held ineffective, or, if it is valid, should the woman be allowed to reclaim it where she does not want it to stand? He replied that if a pretext or an excuse, so to speak, is needed for the gift, the delivery will not be valid, that is, if the wife thinks that any benefit will accrue to the husband from it in the meantime. Otherwise, if she only made use of her husband's services and she did this so that she could revoke the gift or so that the property and all its advantages could pass from the father to the son, why should it not be valid, as if the transaction had been entered into with a stranger, that is, if he had delivered it to a stranger in the same circumstances?

50 JAVOLENUS, *Letters, book 13:* If a woman buys a slave for twenty gold pieces and her husband pays the seller five toward the purchase, he can certainly recover this sum on divorce. It does not matter here whether the value of the slave dropped or even that he died: The husband can still claim the five gold pieces. Has the woman been enriched by her husband's property by the time the action for dowry is brought? She is held to have been enriched in that she has been released from her debt by the intervention of her husband, and she would have still been liable for it if her husband had not paid the money. For it does not matter why the woman owed money, whether it had been borrowed or was due on a sale. 1. Where the woman did not buy the slave but got money from her husband to buy it, if the slave dies or his value deteriorates, the loss is the husband's because, since she would not have bought him if she had not received money from her husband, he gave it and he must bear the loss, provided the slave died naturally. A woman who is not released from liability to her creditor and is not in possession of the property she bought with her husband's money is not held to have been enriched.

51 POMPONIUS, *Quintus Mucius, book 5:* Quintus Mucius says that when a controversy

arises as to the source of property which has passed to a woman, when it is not clear where the property has come from, it is more correct and decent to hold that she got it from her husband or someone in his power. Quintus Mucius appears to have taken this view in order to avoid any disgraceful inquiry involving a wife.

52 PAPINIAN, *Questions, book 10:* If a man leases property for a small sum to his wife as a gift, the lease is void. But where a deposit is made between the same people at a low valuation as a gift, it will be valid. These views are different because a lease cannot be made without a fixed rent, but a deposit can be made without a valuation. 1. A wife provided that the fruits of a piece of land were to be given to her husband by her heir, and if this was not done, she promised a fixed sum *mortis causa.* On the death of the husband during the wife's lifetime, the stipulation fails as well as the delivery which was made *mortis causa* by the wife's mandate; for in circumstances where a *condictio* will lie between strangers, nothing can be done as between husband and wife.

53 PAPINIAN, *Replies, book 4:* It is agreed that a father-in-law cannot make a gift to either his son-in-law or his daughter-in-law *mortis causa,* because if the father-in-law dies, the marriage is not dissolved, and it does not make any difference whether the father disinherited his son or his daughter here. In the case of divorce, the position is different for the same reason. 1. A woman had the use of property which was given as a dowry after valuation, and her husband was aware of this. If the property deteriorates through use, a set-off for damage will not be allowed. The woman cannot maintain that this property was a kind of gift to her under the terms of a will by which gifts were left as legacies to her by her husband, since property of this kind is not held to be gifted or received.

54 PAPINIAN, *Replies, book 8:* A husband stipulated for interest on a dowry which had been promised to him but did not claim it. Since he maintained his wife and her slaves throughout the marriage at his own expense and not only left her the dowry as a preferred legacy but also expressly confirmed his gifts in a *fideicommissum,* it was held that the interest on the dowry was not part of the legacy, but that it had been remitted by the gift.

55 PAUL, *Questions, book 6:* A wife gave some money to her husband and he bought movable property or land with the money which had been given to him. As he was not solvent and the property was still in existence, if the wife revokes the gift, can she successfully bring a *condictio* for it? For although the husband is not solvent, he is held to have been enriched by the gift, where the property which was bought with the wife's money still exists. I replied that it could not be denied that he had been enriched by the gift; for we do not ask what property he has left after the debt is deducted, but what property belonging to his wife he has in his possession. The only difference between him and the recipient of the gift is that there the property still belongs to the wife and she can claim it by a direct action. The husband's position will be worse if he is sued for the value of the property and not for the surplus of the gift than if he is sued in an action on dowry, but there is nothing to prevent the woman bringing an *actio utilis in rem* to recover her own property.

56 SCAEVOLA, *Questions, book 3:* If I want to give my wife something outright where someone else wants to give it to her *mortis causa* on my behalf, the gift I order her to be given will not be valid, because if the other person recovers, I will be liable to a *condictio.* But if he dies, I will nonetheless make a loss, since I will not have what I was going to get.

57 PAUL, *Replies, book 7:* A woman received money from her husband as a gift and wrote to him in the following terms: "Dearest Lord, when at my request you indul-

gently granted me twenty gold pieces to carry out some business of mine, and this sum was paid out on condition that if I, or my conduct, was the cause of the dissolution of our marriage during our lifetime, or if I leave your home without your consent or repudiate you without any cause for complaint, or it is proved that a divorce took place because of me, then I solemnly promise that I will repay and return to you without delay the twenty gold pieces which today you consented to give me as a gift." If the woman repudiates her husband Titius, must she refund the money? Paul replied that the money which the husband gave the wife in accordance with the terms laid down in the stipulation can be recovered if the condition was fulfilled, since then it becomes a loan not a gift. But if the stipulation is not proved, then an action lies for the amount by which the gift enriched the wife only.

58 SCAEVOLA, *Replies, book 2:* If lands and slaves were given to Seia during concubinage and they were later returned by her at the time of the marriage and received by others instead, what does the law say here? He replied that in the circumstances outlined, a business transaction rather than a gift had been made. 1. What about the slaves' food? He replied that food which was provided during the period of concubinage cannot be recovered, nor can this be done where food is provided during the marriage where the wife's slaves are used by both parties. 2. Where a son usually transacted his mother's business, having used his mother's money with her consent to buy slaves and other property, he drew up bills of sale in his own name. He died while subject to his father's power. Could his mother sue her husband, and if she could, what action should she bring? He replied that if the mother intended her son to be liable for the money, she would be entitled to an action on the *peculium* against the father in whose power the son was within a year of his death. If she had given the property, she could recover it to the extent that the father was enriched by the gift.

59 PAUL, *Replies, book 2:* If someone makes a gift to his wife on condition that she accepts what he gives her as a dowry and he dies, the gift will become valid.

60 HERMOGENIAN, *Epitome of Law, book 2:* A stepfather and a stepson are not prohibited from making gifts to one another because of a marriage. 1. Gifts are allowed between a husband and wife in the case of divorce. This often happens because the husband enters the priesthood or because of sterility,

61 GAIUS, *Provincial Edict, book 11:* or where marriage is no longer appropriate because of old age, illness, or military service;

62 HERMOGENIAN, *Epitome of Law, book 2:* so the marriage is dissolved by agreement. 1. A gift between husband and wife is not confirmed where, on divorce, the marriage is not re-established. A gift between a patron and his freedwoman where she cannot divorce him without his consent is not considered to be any different when divorce does occur. So where there is a divorce, any gift which has been made is held not to have been made.

63 PAUL, *Neratius, book 3:* Where a wife's materials are joined to her husband's building in such a way that if they were removed, they could be of some use, the woman can bring an action under the *Twelve Tables* because no other action is available, although it is not likely that the *Decemviri* had in mind people whose property was joined to someone else's building with their consent. PAUL notes: An action can only be brought

here in such a way that the wife can only claim for the recovery of the property which has been delivered, and she does not have one for double damages under the *Twelve Tables*. For property which is made part of a building with the knowledge of its owner is not stolen.

64 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* A man gave his wife some property after a divorce to induce her to return to him. The woman, having returned, divorced him. LABEO: Trebatius in the case between Terentia and Maecenas replied that if the divorce was genuine, the gift would be valid, but if it was simulated, it would be void. But the opinion of Proculus and Caecilius is correct, that a divorce is genuine and a gift made because of it is valid where another marriage takes place, or the woman remains unmarried for so long that there is no doubt that the marriage has been dissolved. Otherwise, the gift will have no effect.

65 LABEO, *Posthumous Works, Epitomized by Javolenus, book 6:* Where a man made a gift to a girl who married when she was not yet of marriageable age, I believe it will become valid.

66 SCAEVOLA, *Digest, book 9:* Seia who was about to marry Sempronius at an arranged date, before being led to his house and signing the marriage contract, gave him some gold pieces. Is this gift valid? He replied that the time when the gift was made does not matter, whether it was before she was led to his house or before the marriage contract was signed, as this is often done after the marriage takes place. So unless the gift was made before the marriage was contracted, which is held to occur when the parties consent to it, it will not be valid. 1. A girl was led to the country house of her husband three days before the marriage took place where she lived apart from him. On the day of the marriage, before she passed into his control and was received under the rite of fire and water, that is, before the marriage was celebrated, he offered her ten gold pieces as a gift. If a divorce took place after the marriage, could the sum donated be recovered? He replied that what had been given as a gift before marriage could not be deducted from the dowry.

67 LABEO, *Plausible Views, Epitomized by Paul, book 2:* If a wife buys a slave with money given to her by her husband or someone in his power and after the slave becomes hers, she delivers him to her husband as a gift, the delivery will be valid, even though this is done with the same intentions as in case of other kinds of gift, and no action can be granted on this basis.

2

DIVORCES AND REPUDIATIONS

1 PAUL, *Edict, book 35:* Marriage is dissolved by the divorce, death, captivity, or other kind of slavery of either of the parties.

2 GAIUS, *Provincial Edict, book 11:* The word "divorce" derives from either the diversity of views it involves or because people who dissolve their marriage go in different directions. 1. Where repudiation, that is, renunciation, is involved, these words are used: "Keep your things to yourself"; or "Look after your own things." 2. It is agreed that in order to end betrothals a renunciation must be made. Here the established words are: "I do not accept your conditions." 3. It makes no difference whether the repudiation is made in the presence of the other party or that in his absence a person in his power is used for this or someone who exercises power over the man or woman here.

3 PAUL, *Edict, book 35:* A true divorce does not take place unless an intention to remain apart permanently is present. So things said or done in anger are not effective until the parties show by their persistence that they are an indication of their considered opinion. So where repudiation takes place in anger and the wife returns shortly afterward, she is not held to have divorced her husband.

4 ULPIAN, *Sabinus, book 26:* Julian asks in the eighteenth book of his *Digest* whether an insane woman can repudiate her husband or be repudiated by him. He writes that an insane woman can be repudiated, because she is in the same position as a person who does not know of the repudiation. But she could not repudiate her husband because of her madness, and her curator cannot do this either, but her father can repudiate for her. He would not have dealt with repudiation here unless it was established that the marriage was to continue. This opinion seems to me to be correct.

5 ULPIAN, *Edict, book 34:* If a girl who has been emancipated gets divorced so that her husband can profit by her dowry and defraud her father, who could claim it as a profectitious dowry if she had died during the marriage, the father should be assisted to prevent him losing the dowry; for the praetor should help the father as much as the husband. The right to claim the dowry, therefore, should be granted to the father just as if his daughter had died during the marriage.

6 JULIAN, *Digest, book 62:* The wives of people who fall into enemy hands can still be considered married women only in that other men cannot marry them hastily. Generally, as long as it is certain that a husband who is in captivity is still alive, his wife does not have the right to contract another marriage, unless she herself has given some ground for repudiation. But if it is not certain whether the husband in captivity is alive or has died, then if five years have passed since his capture, his wife has the right to marry again so that the first marriage will be held to have been dissolved with the consent of the parties and each of the parties will have their rights withdrawn. The same rule applies where a husband stays at home and his wife is captured.

7 PAPINIAN, *Adultery, book 1:* Where someone who has given the other party written notice of divorce regrets having done this and the notice is served in ignorance of the change of mind, the marriage is held to remain valid, unless the person who receives the notice is aware of the change of mind and wants to end the marriage himself. Then the marriage will be dissolved by the person who received the notice.

8 PAPINIAN, *Adultery, book 2:* The deified Hadrian relegated a man for three years

where he had led someone else's wife to his house while she was on a journey, and he sent a notice of repudiation to her husband from there.

9 PAUL, *Adultery, book 2:* A divorce is invalid unless it takes place in the presence of seven Roman citizens of full age as well as the freedman of the persons seeking divorce. We take a "freedman" here to include a person who was manumitted by the father, grandfather, or great-grandfather, or other relative.

10 MODESTINUS, *Rules, book 1:* A freedwoman who has married her patron cannot leave him without his consent, unless she has been manumitted under a *fideicommissum*; she can do so then, even though she is his freedwoman.

11 ULPIAN, *Lex Julia et Papia, book 3:* Where the statute says, "a freedwoman who is married to her patron has no right to divorce him," this is not held to make the divorce invalid, since marriage is usually dissolved by civil law here. So we cannot say that the marriage continues as there has been a separation. According to Julian, a wife is not entitled to an action for dowry here. So it is only fair that as long as a patron still wants her as his wife, she cannot marry anyone else. For the legislator, as he realized that the marriage would be dissolved to a certain extent by the freedwoman's act, prevented her from marrying anyone else; so if she did, she will not be considered married. Julian goes even farther; for he thinks that she cannot live in concubinage with anyone other than her patron. 1. The statute says: "as long as the patron wants her as his wife." This means that he must want her as his wife and continue to be her patron. Therefore, if he ceases to be her patron or to want her as his wife, the statute no longer applies. 2. It has been quite rightly established that the benefit under this statute ceases to be available as soon as the patron shows any sign that he has given up his desire to keep her. So when a patron sues his freedwoman for the unlawful removal of property after she had divorced him without his consent, our emperor and his deified father stated in a rescript that he was held not to want the woman to be his wife when he brings this action or another which is not usually done except where a divorce occurs. So if the husband accuses her of adultery or of some other crime of which no one can accuse a wife except him, the better view is that the marriage is dissolved. For it should be remembered that the wife is only deprived of the right to marry someone else where the patron wants her to remain his. So whenever there is the slightest reason for thinking that the husband does not want her as his wife, the freedwoman has already acquired the right to marry someone else. Thus, if the patron has betrothed or bound himself to another woman or has sought her hand in marriage, he must be held not to want the freedwoman as a wife. The same rule applies where he keeps a concubine.

3

THE RECOVERY OF THE DOWRY ON DISSOLUTION OF THE MARRIAGE

1 POMPONIUS, *Sabinus, book 15:* An action for the dowry takes precedence at all times and in all circumstances; for it is in the public interest for women to keep their dowries, since it is absolutely essential for women to have dowries so that they can produce offspring and replenish the state with their children.

2 ULPIAN, *Sabinus, book 35:* Where the marriage is dissolved, the dowry should be given to the woman. The husband need not promise it by stipulation to someone else at the start, unless this cannot adversely affect him. For if he has any reason to suspect that he might be inconvenienced, he should not be forced to promise the dowry to anyone other than his wife. This is so where the woman is independent. 1. But if she is in her father's power and the dowry comes from him, it belongs to him and his daughter. So the father cannot claim the dowry himself without his daughter's consent or do so by means of a procurator. So according to Sabinus, it must be promised in this way. Thus, it ought to be promised to the person indicated by both parties. But if the father alone orders this, the right to bring an action for dowry will not be withdrawn from the daughter after she becomes independent. Again, if the father alone makes the promise with his daughter's consent, the father's right of action on the dowry will be unimpaired. But can he act alone or bring an action jointly with his daughter? I think the right of action he has jointly with his daughter is not lost. But if the daughter becomes independent, the stipulation will adversely affect him. 2. Where the father brings an action for dowry, should we take the consent of his daughter to mean that she actually consents or that she does not oppose him? It is stated in a rescript of the Emperor Antoninus that a daughter is held to give her consent to her father unless she clearly opposes him. According to Julian, in the forty-eighth book of his *Digest,* a father is held to sue with his daughter's consent if she is insane; for where she cannot oppose him because of her madness, she is rightly held to consent. But if the daughter is absent, her father will not act with her consent, and he will have to furnish security that she will ratify it. When the daughter is sane, we require her then to be aware of the facts in order for it to be held that she does not oppose what is being done.

3 PAUL, *Sabinus, book 7:* The consent of both parties is needed not only in claiming the dowry but also in delivering it where both father and daughter have a joint interest in it and neither of them can adversely affect the other's position. But if the money which the daughter received reaches the father, the action for dowry will not be available to either of them.

4 POMPONIUS, *Sabinus, book 15:* If a father collects a dowry from his daughter's husband without her consent and gives it to her second husband on her behalf, where the father dies and the daughter sues her first husband, she will be barred by the defense of fraud.

5 ULPIAN, *Sabinus, book 30:* As far as the division of the dowry during the year in which divorce took place is concerned, is the time to be reckoned from the date of the marriage or from the date on which the land was delivered to the husband? Where the husband is to keep the profits, neither the date when the dowry was constituted nor the date of the marriage is relevant; the important date is the one on which the land was first made dotal, that is, when possession was given.

6 PAUL, *Sabinus, book 7:* If the land was delivered before marriage, the year must be calculated from the day of the marriage to the same day of the following year. The same applies to the other years of the marriage until divorce takes place; for where the land has been delivered before marriage and the fruits have been gathered, when a divorce takes place, these must be returned as part of the dowry.

7 ULPIAN, *Sabinus, book 31:* It is agreed that profits are what is left when the expenses have been deducted, and Scaevola applies this to the husband's and the wife's expenses. For if the wife gave her dowry the day before the wine harvest and after the grapes have been removed by the husband, he divorces her, he does not think that it is only the profits accruing during the eleven months which should be refunded, but that the expenses incurred should be deducted before dividing the profits. So if the husband pays out anything during this year, the expenses of both parties should be added together. Thus, if an account is made of the expenses incurred by the woman during several years of marriage, it will be necessary to calculate them for the first year before the land was given as a dowry. 1. According to Papinian, however, in the elev-

enth book if his *Questions*, on divorce the profits should be divided not from the time when the property was leased, but account should be taken of the time before this during which the wife was married. For if the land was given as a dowry at the time of the wine harvest and the husband leased it from the Kalends of November and the divorce took place on the last day of January, it is unjust for him to be able to keep the profits of the wine harvest as well as a quarter of the rent for the year when the divorce occurred; otherwise, if the divorce took place on the day before the wine harvest, the husband would keep the whole of the profits. So if the divorce took place at the end of January and the marriage had lasted for four months, the profits of the wine harvest and a quarter of the rent for that year should be consolidated, and out of this money a third should be left to the husband. 2. The same is true the other way round. For if a woman, as soon as the wine harvest is gathered, gives some land as a dowry to her husband and he rents the same land from the Kalends of March and the divorce takes place on the Kalends of April, the husband can keep not only a twelfth of the rent but also a part of the rent due for all of the months during which the land was held as a dowry. 3. Again, if the crops during the year when the divorce took place belonged to the tenant under the lease, and the marriage ends before the wine harvest, the money from the crops nevertheless must be calculated on the basis of the expected wine harvest. 4. So it is clear that the profits a woman obtained before she was married should not be part of her contribution. 5. Set-offs can be made because of gifts as well as on the basis of property removed out of the profits collected after divorce. 6. What has been said a year also applies to six months, where two crops are gathered each year, as is the case where lands are irrigated. 7. The same is true where profits are collected once in several years, as where trees are felled in a forest. 8. Again, if the lease over the land is of the kind where something must be paid over and above the annual rent every five years, we must calculate the extra amount on the basis of how much of the five-year period has elapsed. 9. We maintain that the same is true of not only land but also cattle, so that the wool of sheep and the offspring of cattle must be handed over. If the husband accepts as a dowry some ewes which are about to have offspring or are soon to be sheared, will he not have to return anything where a divorce takes place immediately after offspring are born or the sheep are sheared? Here we must take into account the profits for the whole time during which the animals were looked after, not merely for the time when the profits were collected. 10. Where a slave is involved, the whole year must be taken into account if his services have been leased for a year so that the price of the services for the period before the divorce is the husband's, after the divorce, the wife's. 11. The same rule applies to the rents of urban lands and the fruits of rustic properties. 12. If a wife gives her husband land as a dowry and he cuts down trees, if these are understood to be fruits, their value must be refunded on the basis of the part of the year which has elapsed. (I think that if the trees were meant to be felled or were meant to provide firewood, they should be classed as fruits.) Where they are not considered to be fruits, the husband will be liable for causing deterioration of the land. But if the trees fall down during a storm, the woman must be paid their value, and they should not be classed as fruits, any more than if treasure is found. This is not considered to be part of the fruits, but half of it should be returned to her just as if it had been found on someone else's land. 13. If a husband finds marble quarries on the land his wife gave as a dowry and they make the land more valuable, the marble which has been quarried but not removed

will be the husband's, but the expenses will not be repaid to him, because the marble is not part of the fruits of the land, unless it is the kind of stone which is renewed, as is true of certain types in Gaul and Asia. 14. But the yield of chalk pits or silver or gold mines or any other kind of metal or of sand pits is held to be fruits. 15. Sometimes security is given to the husband by his wife for the fruits, and he will not get anything as where the woman receives the land while the crops are standing. The husband sometimes keeps the whole lot and does not return anything, as where there is no more than he has a right to keep as his share. But sometimes he must return the fruits, as where he has collected more than he should keep. The same is true where an action on dowry is brought against a father-in-law or against the heir of either of them. 16. According to Pomponius, whatever has been spent on the cultivation and planting of the ground is held to have been spent on the gathering of fruits, as well as whatever has been paid out for the preservation of buildings or the care of a sick slave, that is, if any profits are obtained from the building or the slave. But these expenses cannot be claimed where the husband keeps the whole of the profits for the year, because the expenses should have been paid out of the profits first. Clearly, where the husband built a new house where this was necessary or rebuilt the old one which had fallen down without his fault, he will have a claim for the expense. The same applies if he begins to hoe the land. These expenses are either necessary or useful to the property and give the husband an action.

8 PAUL, *Sabinus, book 7:* Where land is given as a dowry and stone is taken from it, it is settled that the profit on the quarries will belong to the husband because it is clear that the woman gave the land to him with the intention that the profits would be his, unless she said something to the contrary while presenting the dowry. 1. Whatever is spent on sowing seeds can be deducted from the wine harvest if the first crop fails because the fruits of the whole year are held to be a unity.

9 POMPONIUS, *Sabinus, book 14:* If a woman delays in receiving her dowry, her husband will only be responsible for fraud and not negligence over this, so as to avoid his being compelled by his wife's behavior to cultivate her land indefinitely. But the profits which fall into the husband's hands must be restored.

10 POMPONIUS, *Sabinus, book 15:* Where a daughter who is married and has a dowry she obtained from her father is captured by the enemy and dies, I think the same rules are to be applied as if she had died during the marriage, so that even if she was not in her father's power, the dowry which came from him should be restored to him. 1. According to Proculus, if a man kills his wife, an action for dowry should be granted to her heir, and this is quite correct. For it is not just for a husband to expect to make a profit out of the dowry as a result of his own crime. The same is true if the situation was the other way round.

11 POMPONIUS, *Sabinus, book 16:* If a woman gives property which she knows is someone else's as a dowry, it should be returned to her just as if she had given her own property along with the profits for part of the year in which the divorce took place.

12 ULPIAN, *Sabinus, book 36:* It is established that a husband can have judgment given against him for the amount he can pay, but his heir is not allowed to do this,

13 PAUL, *Sabinus, book 7:* because this kind of privilege is personal and is extinguished by the death of the person involved.

14 ULPIAN, *Sabinus, book 36:* The situation is different where a defender appears; for it is held that he defends the husband properly if he simply gives the wife the amount which she could have recovered, if she had sued the husband herself. 1. Pomponius poses a neat question in the sixteenth book on *Sabinus*: If a husband has made a pact with his wife that judgment is not to be given against him to the extent of his resources but for the full amount, is this pact binding? He says it is not. This seems to me to be correct; for the better view is that this pact is contrary to sound morals, as it is clear it was entered into in violation of the respect a woman should show to her husband.

15 PAUL, *Sabinus, book 7:* The time when the case was decided must be examined in deciding how much the husband can pay. 1. Although the husband's heir can have judgment given against him for the full amount, he will be entitled to any set-offs in connection with the wife's pecuniary obligations so as to reduce his liability, for example, with regard to gifts or the removal of property or expenses. But he cannot punish her for immorality. 2. The father-in-law has the same privilege when his daughter-in-law brings an action for dowry against him, that is, he can have judgment given against him to the extent of his resources,

16 POMPONIUS, *Sabinus, book 16:* because a father-in-law occupies the position of a parent.

17 PAUL, *Sabinus, book 7:* On the other hand, if a father-in-law is sued by the husband on his promise, will he have the same privilege? According to Neratius in his books of *Parchments* and Proculus, this is only fair. 1. Again, where a wife is sued on her promise, the better view is that she has a defense to protect her. Proculus also says this, just as in the case where a defense is granted to her where she is a partner, although she is liable at civil law. 2. If in an action for dowry a judge, because of his ignorance of the law, gives judgment against a husband for the full amount, according to Neratius and Sabinus, he has a defense of fraud to protect him.

18 POMPONIUS, *Sabinus, book 16:* Children of the woman who are their father's heirs can also have judgment given against them to the extent of their resources according to Labeo. 1. Although a husband is not only liable for fraud but also negligence in connection with the dowry, when an inquiry is made in the course of an action for dowry as to whether he can pay, only the question of fraud is relevant because he is not liable for negligence in managing his own affairs. Although I think fraud can only affect him if he is not solvent, this only applies where he cannot pay his wife the full amount, not where someone else is involved. But according to Ofilius, if dotal property is lost because of the husband's fraud and he is otherwise insolvent, even though he has not committed fraud in order to become insolvent, he should still have judgment given against him for the amount of the dotal property which was involved in his fraud, as if he had made himself fraudulently insolvent. But if he was not guilty of fraud or negligence over the loss of the dotal property, his wife should only receive the rights of action which the husband would be entitled to here, for example, the action for theft or for damage to property.

19 ULPIAN, *Sabinus, book 36:* If a woman divorces her husband and when issue has been joined in an action for dowry, she returns to him; since the marriage has been reestablished, the action lapses and everything will return to its former condition.

20 PAUL, *Sabinus, book 7:* Although a woman has not received a dowry during the marriage in order to pay her debts or buy desirable land but so that she can support her children by a former husband who are in need, or look after her brothers or her parents or ransom them from the enemy, because these objects are just and honorable, the dowry will not be held improperly received, and so it is all right to pay it to her. The same rule applies to a daughter-in-power.

21 ULPIAN, *Disputations, book 3:* Where a husband spends money from the dowry in

order to ransom his wife's necessary slaves from robbers or so that his wife can release one of her necessary slaves from imprisonment, he will be compensated for what he has spent. If only part of the dowry is spent, he can recover it; but if the whole dowry is used up, the action for dowry lapses. The same applies with even greater force where a father-in-law brings an action for dowry, since an account must be rendered of what has been spent on his behalf, whether the husband has done this himself or given it to the daughter so that she can do it. But if the father does not sue, but on his death, the daughter alone brings an action for dowry, the same applies. For since the defense of fraud is part of the action for dowry as is the case with the other actions of good faith, this expense can be said to be included in an action for dowry, especially if it was incurred with the daughter's consent. Celsus also holds this view.

22 ULPIAN, *Edict, book 33:* Where a father gives a dowry or a stranger does so on behalf of a woman and they make provision for one situation as regards death or divorce, the woman will have an action where a situation which is not provided for arises. 1. If, after the marriage is dissolved, a daughter-in-power uses up the dowry belonging to herself and her father without his consent, the father will have an action to have the dowry paid to him, whether the daughter is alive or dead. This is true where it is given to a woman who is likely to squander it. But if it was given for good reasons to a woman who was not likely to squander it, no action will lie. On the father's death, his heirs cannot sue, and the woman herself cannot do so either. 2. If after a marriage ends a woman is deceived into accepting an insolvent debtor by novation, she will have an action for dowry. 3. Where a father in his daughter's absence sues for the dowry, even though he did not give security for the ratification of his act, the daughter will be refused an action whether she becomes his heir, or receives as a legacy an amount equal to her dowry. Julian says in several works that the property given to her by her father should be set off against her dowry, and it would be profitable for her if she received as much from him as was due from her husband as a dowry and which he paid to her father. 4. Where a father is not allowed to remain in Rome where the action for dowry is brought because of some sentence imposed on him, the amount of the dowry must be paid to the daughter provided she gives security that her father will ratify her actions. 5. A daughter must give her consent at the time of joinder of issue where her father brings the action. It follows that if she tells her father she consents and changes her mind or is emancipated before joinder of issue, her father's action is ineffective. 6. We agree with the view of Labeo that sometimes a father should be refused an action, if he is the kind of man who would be likely to squander the dowry if he received it. So the authority of the judge should be used to protect the interests of both father and daughter as far as possible. But if the daughter goes into hiding so that she cannot be forced to give her consent to a father of this kind, I think an action should be granted to the father, but only after cause has been shown. What if a daughter modestly opposes her father by her absence? Should the father not have an action? But if the father is the kind of man to whom the daughter certainly should give her consent, that is, a man with a good reputation, and the daughter is a fickle woman or too young or too much under the influence of an undeserving husband, the praetor should allow the father to obtain it instead and grant him an action. 7. Let us see what is to be done if a husband or a wife becomes insane during the marriage. There can be no doubt that the person in the grip of insanity cannot repudiate the marriage, because that person is not in possession of his senses. What if a woman is repudiated in these circumstances? If there are lucid intervals during the madness or the disease is permanent but bearable for those connected with her, then the marriage ought not to be dissolved at all. Where a person who is aware of the situation and is of sound mind repudiates the other party who is insane in the way we described above, that person will be to blame for the dissolution of the marriage. For what could be more generous than a husband and wife sharing in each other's misfortunes? But if the insane person is so violent, savage, and dangerous that

there is no hope of recovery and it is terrible for her attendants and if the other party fears for his safety and is tempted by the desire to have children because he has none, this person will be allowed, if of sound mind, to repudiate the other party who is insane, so that the marriage will be ended without blame attaching to anyone and neither of them will suffer any damage. 8. But suppose the woman has the most savage form of insanity and the husband does not want to end the marriage because he is too cunning for this, but treats his wife's misfortune with scorn and shows her no sympathy but clearly does not give her proper care, but misuses her dowry. Here the insane woman's curator or her relatives can go to court to force the husband to give all this sort of support to the woman, to provide for her, to give her medicines, and to omit nothing a husband should do for his wife as far as the amount of the dowry allows. But if it is clear that he is about to squander the dowry and not enjoy it as a man should, then the dowry should be sequestered, and the wife should have enough for maintaining herself and her household. All dotal pacts which the parties entered into at the time of the marriage must continue in their former condition and are dependent on the recovery of the wife or her death. 9. Again, the father of the insane woman can legally begin an action to recover the dowry himself or for his daughter. For although the insane woman cannot repudiate, her father can certainly do so. 10. If after the marriage has been dissolved the father becomes insane, his curator can bring an action to recover the dowry with his daughter's consent, or where there is no curator, the daughter can bring it, but she must give security that her act will be ratified. 11. It has also been decided that where a father is captured by the enemy, an action to recover the dowry should be granted to the daughter. 12. Let us now pass on to another topic and ask against whom the action for dowry will lie. Clearly, it will lie against the husband himself whether the dowry was given to him or to someone else with his consent, whether the person was in his power or not. But if the husband is a son-in-power and the dowry is given to his father-in-law, the action must be brought against the father-in-law. Clearly, if it was given to the son or on the orders of the father-in-law, the father-in-law will still be absolutely liable. But if it is given to the son but not on the orders of the father, according to Sabinus and Cassius, an action could still be brought against the father because the dowry is held to have passed to the person who has the *peculium.* It will be sufficient, however, for judgment to be given against him for the amount of the *peculium* or as far as the father has taken benefit. But if the dowry has been given to the father-in-law, he cannot sue the husband unless he becomes his father's heir. 13. Where a woman makes a mistake about her husband's status and thinks he is a freeborn man when he is, in fact, a slave, some concessions must be made to her in connection with her husband's property as a privilege. For example, if there are other creditors, she must be preferred in an action on the *peculium.* If the slave is in debt to his master, the woman will not be preferred to him except as regards property given as a dowry or bought with money from the dowry, since property of this kind is dotal.

23 PAUL, *Edict, book 36:* Where money has been spent on dotal property and the woman does not restore it, the defense of fraud will be available.

24 ULPIAN, *Edict, book 33:* If during the marriage the wife wishes to sue because of her husband's lack of funds, when should she start proceedings for the return of her dowry? It is settled it can be demanded when it is quite clear that the resources of the husband are insufficient to return the dowry. 1. If a wife sues after her husband has been disinherited, the better view is that proceedings for the dowry should commence

at the time the heir accepted his father's estate. 2. Whenever security should be given to a wife for the payment of her dowry at the end of a specified period and the husband cannot give this security, then once a deduction for the benefit enjoyed during this time has been made, he should have judgment given against him for the rest. But if the husband refused to give security, when he can do so, according to Mela, he is to have judgment given against him for the full amount without taking into account the benefit enjoyed during this period. So it is one of the duties of a judge to release the husband if security is given or to give judgment against him after taking into account the set-off. This is the procedure used nowadays, and a woman is not allowed to say she would rather put up with the delay rather than have the amount to be paid reduced. 3. Whether the dowry is at the husband's risk or the wife's, the husband must still pay it within the legal time. 4. Where a husband with his wife's consent manumits dotal slaves, even if his wife wanted to make a gift of the slaves to him, he will not be liable for the expenses incurred in freeing them. But if he was acting as her unauthorized agent, he will be forced by the court to give security to restore anything which passes to him from the property or obligations of the freedmen to his wife. 5. If the husband is cruel to dotal slaves, let us see whether he can be sued because of this. If he is only cruel to his wife's slaves, it is settled that he will be liable for this. But if he is the kind of man who behaves in this way toward his own slaves, his extreme cruelty should be checked by this action. For although a wife cannot demand from her husband greater diligence than he shows in his own affairs, if the cruelty he shows in connection with his own slaves is blameworthy, it must be stopped as far as the slaves of others are concerned, that is, the dotal slaves. 6. If a wife lends property belonging to her husband and it is lost, can she allow this to be set off against her dowry? I think if her husband forbade her to lend it, the deduction should be made at once. If he did not forbid her to lend it, the judge can give her a reasonable time to return it, if she gives security for it. 7. When part of a wife's property is confiscated, she has an action for the rest of her dowry. I also hold that if part of the dowry has been confiscated after joinder of issue, it will be sufficient for the judge to give judgment for the rest to be restored. But if the whole of the dowry is confiscated, the action disappears.

25 PAUL, *Edict, book 36:* Where a dowry is given to a son-in-power without his father having ordered this, an action on the *peculium* will lie. But the *peculium* is increased where expenses are incurred by the son or property is donated by him or because things belonging to the *peculium* have been removed by the wife, because the father has an action derived from the son and so everything in the *peculium* must be given to the wife if anything is still due to her. 1. The husband when restoring the dowry must give security against fraud and negligence. If he has behaved fraudulently to avoid restitution, he will have judgment given against him for the amount the woman swears to in court, because no one should keep our property without our consent. 2. If dotal property deteriorates after a divorce and the husband causes a delay in the return of the dowry, he will be liable for any kind of deterioration. 3. If slaves forming part of the dowry run away, the husband must give security that he will pursue them and restore them. 4. Where a husband rents dotal land for five years and after one year a divorce takes place, according to Sabinus, he need return the land to his wife unless she gives security indemnifying him against being found liable for anything which happens after the first year of the lease. But he must give his wife security that he will restore whatever he gets under the lease after the first year.

26 PAUL, *Edict, book 37:* Where the husband has caused a delay once and the wife refuses to accept a dotal slave he offers her later and the slave dies, neither the husband nor his heir will be liable for the value of the slave or for damage, because his wife refused to accept the slave when the husband offered him.

27 GAIUS, *Provincial Edict, book 11:* If a wife dies after a divorce and her heir sues her husband or his father, the same rules are held to apply in connection with the return of the dowry as usually apply where the woman herself brings the action.

28 ULPIAN, *Institutes, book 1:* The husband is also held to be able to act where he can sue his wife for anything, for example, if he has lost money because of her, either by spending it on her or paying it out at her direction. But if he has not yet lost anything, for example, where he is conditionally liable, he is not yet held capable of suing.

29 ULPIAN, *Disputations, book 3:* Whenever a father gives a dowry and stipulates for its return, he does not transfer the right to an action for dowry to the daughter herself unless it is agreed that it will be continuous. But if he wanted to stipulate for the intervening time, he cannot do this without his daughter's consent, even if she is in his power, because he cannot adversely affect the girl's dowry unless she consents. Clearly, if he gave the dowry before marriage, he can stipulate for the intervening period, even before the marriage, without his daughter's consent. 1. Where anyone gives a dowry on behalf of a woman and agrees that it is to be paid to him when the marriage ends in any way at all and the husband later pays the dowry to the wife, it is quite rightly held that an action will still lie in favor of the person who gave it against the husband.

30 JULIAN, *Digest, book 16:* A married woman is not barred from suing her first husband for her dowry. 1. When through the fault of the husband a dowry is not claimed from the father-in-law or anyone else who promised it on the wife's behalf, or where a daughter dies during marriage or on becoming the mother of a household she is made the heir of the party who promised the dowry, it is well established that the husband is not liable for anything more than releasing them from their obligation.

31 JULIAN, *Digest, book 18:* If a husband has been convicted of a criminal offense and part of his property is confiscated, the imperial treasury must pay his creditors, including his wife. 1. Where a father promised two hundred gold pieces as a dowry for his daughter and he entered into a pact that no more than one hundred should be claimed from him and, on dissolution of the marriage, the one hundred gold pieces which the pact had said were not to be claimed, were demanded, they are not understood to form part of the dowry. But if after the father's death the husband sues his heir, this money will be included in the dowry. 2. If a procurator appointed by the father brings an action for the dowry with the daughter's consent and the father dies after judgment, the action should be granted to the daughter rather than the father's heirs. 3. Where the dowry has been given to the father and one of his sons has been instituted as heir to part of his estate under a condition, and while the condition is pending his co-heirs pay the woman the dowry in proportion to their shares, the son will be released from liability for the dowry, since he will not have an action against his co-heirs for his share of the money. 4. Where a woman receives land as her dowry but no account of the crops for the part of the year when she was not married has been taken, she can still bring the action for dowry, since she received a smaller dowry than she ought to have. For an increase in the dowry is involved just as if she had not received the offspring of slaves or legacies on inheritances which her husband acquired by means of dotal slaves after a divorce.

32 JULIAN, *Urseius Ferox, book 2:* If a former husband as his wife's debtor promises a dowry to her second husband, the amount of the dowry will not be any more than the first husband can afford.

33 AFRICANUS, *Questions, book 7:* A woman promised a certain sum as a dowry and produced people to stipulate that part of it was to be paid to them if the marriage was dissolved. The woman died before any dowry had been given after making her husband her heir, and he accepted her inheritance which was ruinous. He will still be liable to the people with whom the stipulation was made, since by accepting the inheritance of a woman who was his debtor he is held to have reimbursed himself. It makes no difference that the estate was insolvent, since he is liable to the other creditors.

34 AFRICANUS, *Questions, book 8:* Titia divorced Seius. Titius said she was in his power and demanded the dowry be returned to him while she said she was independent and wanted to sue for her dowry. What side should the judge take? I replied that he should refuse the father an action unless he could prove not only that his daughter was in his power but also that she had agreed to the action, just as he should refuse an action even though it is established that she is in his power.

35 MARCIAN, *Institutes, book 10:* A freedwoman who is divorced from her patron with his consent can sue him for the dowry he gave her.

36 PAUL, *Adultery, book 2:* Where a husband is unable to pay the dowry and it is confiscated, judgment should be given against him in favor of the imperial treasury for what he can pay, so that the woman is not punished by the husband's ruin.

37 ULPIAN, *Replies, book 2:* A father is held to have received the dowry with his daughter's consent when she can show no good reason for opposing this, especially if she is later given a larger dowry by him.

38 MARCELLUS, *Replies, sole book:* Lucius Titius, a son-in-power, married Maevia with his father's consent, and his father received the dowry. Maevia then repudiated Titius, and his father, in the absence of his son who had been repudiated, entered into a betrothal with her on his son's behalf. Maevia repudiated the betrothal and married someone else. If Maevia brings an action against Lucius Titius, her former husband to whom the dowry was left as his father's heir, and it is proved that the marriage was dissolved through the woman's fault, could the husband keep the dowry on the basis that the woman was to blame? Marcellus answered that even if Lucius Titius was sued as his father's heir, if he had not consented to the betrothal, the woman's fault should be punished by a fine.

39 PAPINIAN, *Questions, book 11:* Where a husband and wife accuse each other of immorality in court and it is declared that both of them have given cause for repudiation, the decision should be taken to mean that since they have both treated the law with contempt, neither can make use of it in their claims, as their faults disappear when set against each other.

40 PAPINIAN, *Questions, book 28:* After the dowry was given and the marriage taken place, the father with his daughter's consent stipulated that the dowry was to be returned to him on divorce. If the condition of this stipulation is fulfilled and the daughter then dies without issue, there is no objection to the father suing on the stipulation, but if he wanted to bring an action during his daughter's lifetime, he would be barred by a defense.

41 PAPINIAN, *Questions, book 37:* Where a father not knowing his daughter has been divorced pays over the dowry as he promised, the money can be recovered by an action for dowry, not an action for money not due.

42 PAPINIAN, *Replies, book 4:* Where a father who has given a dowry for his daughter is deported to an island, an action for dowry can be brought by the daughter. Again, if the father is convicted after a divorce, where he could have brought an action with his daughter's consent, the woman herself also has such an action for dowry. 1. It is held that the fruits of land given as a dowry cannot be recovered while they are picked in good faith and used to pay the woman's expenses before the question of her freedom arose, even though she is later shown to be a slave. It is proper that necessary and useful expenses incurred in connection with land which appeared to be dotal should be set off against the fruits and the excess restored. 2. Where a father, after his daughter has died during the marriage, brings an action on a stipulation to collect the interest on money paid as a dowry, it is held that his son-in-law, who stipulated for the interest on the rest of the dowry, can claim a set-off against the amount due, if he supported his wife at his own expense. Otherwise, if she was supported by her father, the stipulation for the interest, being void, will not give the benefit of a set-off. 3. If

after a divorce the wife returns to her husband, the judgment obtained on the stipulation which a stranger who gave the dowry entered into will not be annulled, nor can the court order a release.

43 SCAEVOLA, *Questions, book 2:* Where a husband is found liable for what he can pay and he has debts which amount to the same as the dowry but not more, he will not be compelled to assign his rights of action.

44 PAUL, *Questions, book 5:* If a father-in-law instituted heir by his son-in-law accepts the inheritance and the father dies, his daughter can bring an action for dowry against his heir according to Nerva and Cato. This view is also stated by Sextus Pomponius in the fifth book of his *Digest of Aristo;* he agrees with Aristo there. I would say that if the father emancipates the daughter, he can also be sued by her. 1. Lucius Titius promised Gaius Seius one hundred gold pieces as a dowry for his daughter. It was agreed between Gaius Seius and Lucius Titius, the woman's father, that the dowry was not to be demanded of the husband during the lifetime of Lucius Titius, that is, the woman's father. The marriage was later dissolved by divorce for which the husband was to blame, and the woman's father died, having appointed other heirs and disinherited the daughter. Could the husband collect the dowry from his father-in-law's heirs, since he was obliged to restore it to the woman? I replied that since the daughter was entitled to an action for dowry, as other heirs had been appointed by her father, her husband either had to surrender the dowry or assign his rights of action to her, and the father-in-law's heirs would have no defense against him. For it would be absurd to say someone had committed fraud when he demands restoration of the money not to the person he sued but to someone else. Otherwise, if divorce took place after the father's death and before the dowry had been demanded, the husband would be excluded from bringing an action for dowry, and this should not be so. But even if the daughter had been appointed heir to part of the father's estate, the husband should sue her co-heirs according to their own shares and either return this to the woman or assign her his rights of action.

45 PAUL, *Questions, book 6:* Gaius Seius, the maternal grandfather of Seia, a granddaughter in his power, gave a certain sum of money as a dowry to Lucius Titius, her husband, and inserted in the dotal instrument the following pact and stipulation: "If there is a divorce between Lucius Titius the husband and Seia without fault on her part, the whole of the dowry is to be returned to Seia, the wife, or to Gaius Seius, her maternal grandfather." If Seius the maternal grandfather dies straight away and Seia later divorced without fault on her part during her father's lifetime in whose power she was, who has the action under the pact and stipulation, the heir of the maternal grandfather on the stipulation or the granddaughter? I replied that the stipulation seems to be void as far as the granddaughter herself was concerned, as the maternal grandfather made the stipulation on her behalf. For since this is so, the heir of the stipulator is held to be entitled to the action when the woman divorced. The dowry can be paid to Seia (even though she has no direct action for it) just as if her grandfather had stipulated that it should be given to him or someone else. The granddaughter should be allowed, because of her grandfather's agreement, to bring an *actio utilis* to prevent her being defrauded of the benefit of her dowry. This course should be adopted as a favor to the marriage and particularly because of the affection of the parties.

46 PAUL, *Questions, book 19:* Where someone promised a dowry to a wife by stipulation and left her something as a legacy but on condition she did not claim the dowry from his heir and she was unable to receive the property left to her, I replied that an action for dowry against the heirs should not be denied to the woman.

47 SCAEVOLA, *Questions, book 19:* Where a woman commits adultery at the instigation

of her husband, he cannot keep any of her dowry. For why should a husband disapprove of morals which he either corrupted himself in the first place or encouraged later? If anyone maintains that according to the intention of the statute, a husband who allowed his wife to prostitute herself cannot accuse her, this view demands a hearing.

48 CALLISTRATUS, *Questions, book 2:* If there was a stipulation in a dotal instrument to the effect that the dowry is to remain the husband's for the benefit of the children, he can also keep it for the benefit of grandchildren.

49 PAUL, *Replies, book 7:* Maevia gave her husband among other things in her dowry a promissory note for ten solidi which a certain Otacilius had executed for Maevia saying he would give her ten solidi when she married. The husband made no claim on this note because he could not do so. If the dowry is demanded of the husband, can he be forced to refund the sum mentioned in the note? I replied that the husband could sue the debtor, as he had a mandate from her for such actions. But if he could not claim the money without fraud or negligence, he could not be sued on the basis of the dowry or for mandate. 1. Some land on being valued and given as a dowry was taken by a prior creditor since it had been pledged. Should the woman be barred by a defense of fraud where she claimed the value of the dowry? It is held not to be available on her account, because her father gave her the dowry for herself and she was not his heir. Paul replied that where he had been evicted from the land without either fraud or negligence on the husband's part, he had the defense of fraud against the woman's claim for the amount of the dowry, as it would clearly be unjust for her to recover the value of the land after the eviction, as the father's fraud should only adversely affect her.

50 SCAEVOLA, *Replies, book 2:* Some property after being valued was given as a dowry and a pact was drawn up saying that if the dowry was to be returned for any reason at all, the same property was to be restored and an account taken of its increase or diminution according to the judgment of a good man. So far as any property which no longer exists is concerned, its initial valuation is to be taken. Where some property which the husband sold was still in existence, should it be the woman's on the basis of the pact? I replied that if this property existed and had been sold without the woman's consent or ratification, it should be returned as if there had been no valuation.

51 HERMOGENIAN, *Epitome of Law, book 2:* Where property has been valued, it is at the husband's risk even if it has deteriorated because the wife used it.

52 TRYPHONIUS, *Disputations, book 7:* A husband after a divorce paid back by mistake a dowry which he had not received. He can recover it, because he had agreed it had not been paid; for it cannot be demanded from him.

53 TRYPHONINUS, *Disputations, book 12:* If a dowry is given to a son-in-power, he himself will be liable to an action for dowry, but his father will be liable to one on the *peculium*. It makes no difference whether or not a person holds the property as *peculium* or as a dowry; he should have judgment given against him for as much as he can pay. But his ability to pay is understood to depend on the amount he has in the *peculium* at the time of judgment. But if an action is brought against the father, whatever the son owes the father or others in his power must be deducted from the *peculium*. If the action is brought against the son, no deduction can be made of any other debt in calculating the amount the son can pay.

54 PAUL, *Exceptional Rights, sole book:* The ability of the husband to pay is decided without deducting any debt; the same applies to a partner, a patron, and a parent. But where someone is sued because of a gift, his ability to pay is considered after all debts have been deducted.

55 PAUL, *Plautius, book 5:* When a woman brings an action to recover her dowry after the marriage is over, she must indemnify her husband where he has given security against threatened injury, if she wants to recover her dowry, so that she can secure her husband against any risk.

56 PAUL, *Plautius, book 6:* If anyone stipulates with a husband on these terms, "if for any reason Titia ceases to be your wife, will you give up her dowry," by this general clause, the stipulation operates when the woman is captured by the enemy, deported, or enslaved; for a clause like this covers all these eventualities. But if the terms of the stipulation are strictly construed, will it apply where the woman dies or is divorced? It is held to be better to apply it where death is involved.

57 MARCELLUS, *Digest, book 7:* When a usufruct is given as a dowry and a divorce takes place, title to the property will not vest in the husband or the wife, and where the dowry is to be returned, the husband must give security that as long as he lives, the woman and her heir will be allowed to enjoy the usufruct. I doubt whether it is right to add the heir here; for it makes a difference how the usufruct was given as a dowry. If the woman is to have the profits, the usufruct on her death will pass to her husband in whom title to the property vests, and she will lease for her heir; for the usufruct will be due to her husband who does not usually transfer it to her. But if the woman gave her husband the usufruct with the land, it must be restored by him to the heirs, since it passes along with title to her heirs, if the husband did not delay in surrendering it. But if the property has been alienated or if someone has given the usufruct of his land to her husband as a dowry on the wife's instructions, how it can be restored to the woman is the first consideration. This can be done either by means of a security given by the husband, or he can assign his rights to his wife as far as he can and allow her to enjoy the property. Or he can come to an arrangement with the owner of the property, so that with his consent the usufruct can become the woman's, since he can either grant her the usufruct of the land or give her something instead according to agreement. For suppose that the woman sells the usufruct to the owner of the property. Here it would not be unfair for the husband to be forced to transfer the usufruct, since he cannot even be sued by the woman's heir. For if he had not delayed, she could have left the price of the usufruct to her heir. But if she did not have the power to sell the usufruct to the owner of the property, the husband would have to allow the heir to gather the fruits as well as the woman herself.

58 MODESTINUS, *Advice on Drafting, sole book:* Where a dotal slave is appointed someone's heir, he can either accept or reject the inheritance on the husband's instructions. But so as to prevent the husband being liable to an action for dowry brought by the wife because he has been too eager to reject the inheritance or rash in accepting it without knowing what condition it was in, it is advisable for the woman to be asked in front of witnesses whether she wants to reject the inheritance or accept it. If she says she rejects it, the slave can easily repudiate it on the husband's instructions. But if she would rather accept it, the slave must be returned to the wife by the husband on condition that when he accepts the inheritance at her direction, he will be returned to the husband again. In this way, the husband's solicitude is dealt with and his wife's wishes complied with.

59 JULIAN, *Urseius Ferox, book 2:* The husband of my daughter who was emancipated and ill sent her notice of repudiation so that after she died he could give the dowry to her heirs rather than to me. According to Sabinus, an *actio utilis* should be given to me for the recovery of the dowry, and Gaius says the same.

60 PROCULUS, *Letters, book 5:* Where a daughter-in-power who was married dies and her father pays the funeral expenses, he can recover them immediately by bringing an action even though the son-in-law was obliged to restore the dowry at the end of a specified period. After he has received the funeral expenses, the rest of the dowry can be paid at the agreed time.

61 PAPINIAN, *Questions, book 11:* A husband manumitted a dotal slave without his wife's consent. He was then made the sole heir by the freedman to the part of the

estate which he could and should claim as a patron to restore to his wife, but she has a dotal action for the remaining part if she opposes the manumission of the slave.

62 ULPIAN, *Edict, book 33:* If, however, a husband manumits dotal slaves with his wife's consent where she wanted to make him a gift, he will not be liable for giving them their freedom.

63 PAUL, *Lex Julia et Papia, book 2:* And here the slave ceases to be part of the dowry because, where a person is allowed to make a gift for the sake of manumission, this is the same as making a gift to him because he is allowed to manumit a slave.

64 ULPIAN, *Lex Julia et Papia, book 7:* But if a husband is acting as an unauthorized agent for his wife with her consent and he manumits a dotal slave with her permission, he must return to his wife whatever comes to him by means of the slave. 1. But if he imposes any conditions on the slave in return for his freedom, he will be liable to his wife for them. 2. It is clear that if services are performed for the husband and no valuation of them is made, it will not be fair for the husband to pay his wife anything for them. 3. But if anything is imposed on the freedman after manumission, he is liable to the wife for it. 4. But if the freedman is the husband's debtor or is liable to him for another obligation, the husband must assign his rights against him in the same way. 5. He must also deliver to her any of the freedman's estate he receives if he acquired it as a patron. But if he acquires it any other way, he need not transfer it; for he is not liable to his wife for what the freedman gives him gratuitously but only for what he obtains or can obtain as his right as a patron. Clearly, if he is appointed as heir by the freedman to the greater part of the debt he owes him, he will not be liable for what is left over. If the freedman makes him his heir when he is not in debt to him, he need not give his wife anything. 6. He must give "whatever he receives" as the statute says. We take this to mean whatever he demands or can demand because he has a right of action. 7. The statute also says that the husband is liable where he has committed fraud to avoid receiving property. 8. If a patron disinherits his son and the son obtains the freedman's property, will the heir be liable for this? And where neither the patron nor the heir receives anything, how could he be liable here? 9. The statute talks of the husband and his heir. Nothing is said about the father-in-law and his successors, and Labeo notes that this has been left out. In these cases, the statute is defective and not even an *actio utilis* can be granted. 10. Where the statute says, "the husband must give up the money he receives," it is clear that the statute did not intend him to hand over the inheritance itself, but the value of the inheritance or of the freedman's estate, unless the husband prefers to hand over the actual property; and this should be admitted as the more generous interpretation.

65 SCAEVOLA, *Questions Publicly Answered, sole book:* This action can even be brought by the wife during the marriage.

66 JAVOLENUS, *From the Posthumous Works of Labeo, book 6:* According to Servius, a husband is responsible for fraud and negligence in connection with all the property in the dowry apart from money. This is also the view of Publius Mucius; for he stated it in the case of Licinnia, the wife of Gracchus, whose dotal property had perished during the insurrection in which Gracchus was killed, saying that the property should be restored to Licinnia since Gracchus was to blame for the insurrection. 1. A husband gave his wife's slave money to buy clothes. When they had been procured, a divorce took place within the year. According to Labeo and Trebatius, the clothes should be returned to the husband in the same condition they were in after the divorce. The same rule would apply if the husband had bought the clothes and given them to the slave. If the clothes are not returned, their cost can be set off by the husband against the dowry. 2. A daughter who was under paternal power when her divorce was made

ordered the dowry to be returned to her father. When part of the dowry had been paid, the father died. According to Labeo and Trebatius, the rest should be paid to her unless it had been left or promised to the father with novation in mind. This is correct. 3. You received as a dowry some slaves who had been valued, and a pact was entered into that on divorce you should return slaves of equal value; but no mention was made of the offspring of dotal slaves. According to Labeo, these children will still be yours, because of the risk you run of losing slaves. 4. A woman whose husband had one hundred gold pieces of hers as a dowry stipulated after a divorce for the return of two hundred due to her husband's error. According to Labeo, she will only be entitled to what was in her dowry, whether she knowingly stipulated for more or did this in innocence. I agree with Labeo's view. 5. A wife on divorce received part of her dowry and left part of it with her husband then married someone else. On becoming single again she returned to her first husband. She gave him one hundred gold pieces as another dowry without mentioning the money left over from the first dowry. If there is another divorce, according to Labeo, the husband will have to return the remainder of the first dowry within the same period as he would have returned it if the first divorce had not taken place between them, as the rest of the former dowry was transferred to the obligation under the second one. I think this is correct. 6. When during the marriage a husband releases his father-in-law from the dowry he promises, without his wife directing him to do so, according to Labeo, he does this at his own risk, even where it is done because of the father-in-law's poverty. This is correct. 7. Where someone promises a dowry to the husband on behalf of his wife and then, having made the woman his heir, dies, according to Labeo, the woman must assume the risk for the part of the dowry for which the husband was liable, because it would not be fair for the wife to be enriched at her husband's expense and to hold him liable for what he could not have demanded from her. I think this is correct.

67 POMPONIUS, *Letters, book 20:* Whatever a husband must return to his wife from the *peculium* of a slave will be part of the dowry which must be restored. So the husband will be liable for fraud and negligence he shows in acquiring or keeping the *peculium*; and the profits arising from it will belong to the husband like those of any other dotal property.

BOOK TWENTY-FIVE

1

EXPENSES INCURRED IN CONNECTION WITH DOTAL PROPERTY

1 ULPIAN, *Sabinus, book 36:* Some expenses are necessary, some are useful, but some are incurred for pleasure. 1. Expenses are said to be necessary where they arise out of necessity. But where there is no necessity for them, other rules apply to them. 2. As far as necessary expenses are concerned, note that they only reduce the dowry when they are incurred in connection with it. But if they are not incurred in connection with the dowry, they do not count in themselves. 3. According to Labeo, dikes built in the sea or a river count as necessary expenses. Where a mill or a granary is built to fulfill a need, it should be considered a necessary expense. So according to Fulcinius, if a husband rebuilds a house which was falling into ruin but was useful to his wife, or if he replants an olive orchard where trees have blown down, or if he enters into a stipulation covering threatened damage,

2 PAUL, *Sabinus, book 7:* or spends money on curing slaves,

3 ULPIAN, *Sabinus, book 36:* or plants vines or looks after trees or nurseries for the good of the land, he will be held to have incurred necessary expenses. 1. We generally make a firm distinction between a payment made for the permanent good of the land and one which does not relate to the present time, on the one hand, and one connected with the fruits of the present year, on the other. Where it relates to the present year, it should be set off against the fruits; but where the payment does not apply to the present time, it should be considered a necessary expense.

4 PAUL, *Edict, book 36:* A judge will give judgment against a husband for everything he omits to do in connection with necessary expenses to the extent that it is in the wife's interest to have these expenses incurred. But there is a distinction here; where work has been carried out, this will be taken into consideration, even if it turns out badly; but where nothing has been done, this will not happen. So if he provides support for a block of apartments which is about to fall and it is burned down, the expenses are recoverable; but if he did not do this, and the house is burned down, he will not be liable for anything.

5 ULPIAN, *Sabinus, book 36:* Where it is said that necessary expenses reduce the dowry, according to Pomponius, this must be taken to mean not that the property is physically diminished in the case of land or any other kind of property. For it is absurd to hold that any reduction in substance can occur because money is spent. But what happens is that it ceases to be dotal land in whole or in part. So the husband will continue to control it until his claim is satisfied; for there is no reduction by law in the substance of the property, but there is a reduction of the dowry. When can we admit that there has been a reduction in the dowry by law? When the dowry consists of money not property; for it is reasonable to admit that there can be a reduction in money. So if some property on being valued is given as a dowry, the dowry will be reduced by

law to the necessary expenses. This is said to apply to expenses incurred in connection with the dowry itself, but if they arise for other reasons, they do not reduce the dowry. 1. Where a wife pays the necessary expenses, can we say that this increases the dowry, or should it be held to be unaffected? Where the dowry consists of money, I have no doubt that the dowry should be held to have increased. 2. Where the whole of the dowry is paid without taking the necessary expenses into account, can the amount which is usually set off against the necessary expenses be recovered by a *condictio*? According to Marcellus, there are grounds for a *condictio* and although many deny this, Marcellus's view ought to be upheld as a matter of justice. 3. Useful expenses are ones which the husband usefully incurs and which improve the wife's property; that is her dowry,

6 PAUL, *Sabinus, book 7:* for example, where a new plantation is established on the land, or where the husband adds a bakery or a shop to the house, or teaches the slaves some trade.

7 ULPIAN, *Sabinus, book 36:* Expenses for pleasure are those which the husband incurs for pleasure and which are ornamental. These expenses, even where they are useful, do not reduce the dowry by law, but they can be demanded.

8 PAUL, *Sabinus, book 7:* Some say that there should be a deduction for useful expenses only where they are incurred with the wife's consent; for it would be unfair for her to be forced to sell the property to pay the expenses incurred over it if she cannot pay them any other way. This view accords with the highest principles of justice.

9 ULPIAN, *Sabinus, book 36:* A husband is allowed to demand payment from his wife for expenses incurred for pleasure if she does not allow him to remove what caused them. For if the wife wants to keep the improvements, she must repay the amount spent on them by her husband. If she does not wish to keep them, she must allow him to remove them, as long as they can be separated. If they cannot be separated, they must be left. For the husband should not be allowed to take away ornamented property unless he can make it his.

10 PAUL, *Edict, book 36:* Where the property for which the expenses were incurred is for sale, the expenses are not for pleasure but are useful.

11 ULPIAN, *Sabinus, book 36:* As regards expenses incurred for pleasure, the husband cannot demand them, according to Aristo, even if they have been incurred with his wife's consent. 1. Sabinus quite rightly states that the prohibition on gifts between husband and wife extends to expenses.

12 PAUL, *Sabinus, book 7:* An arbitrator should not concern himself with moderate expenses incurred in building houses, planting or cultivating vines, or treating slaves who are ill; otherwise, the decision will seem to be one on unauthorized administration rather than dowry.

13 PAUL, *Abridgments, book 7:* A husband cannot collect any tax or tribute paid on dotal land from his wife; for these things are charges on the profits.

14 ULPIAN, *Rules, book 5:* Necessary expenses are those which if left undone will reduce the value of the dowry, like those for building dikes, diverting rivers, supporting or rebuilding old buildings, and replacing trees which have died. 1. Useful expenses are for things like putting cattle in fields to fertilize them. 2. Expenses are incurred for pleasure where baths are constructed.

15 NERATIUS, *Parchments, book 2:* When necessary expenses incurred over dotal property are said to diminish the dowry, this must be taken to mean where money is spent on the dotal property over and above what is needed to look after it, that is, for its benefit. For a man must look after dotal property at his own expense. Otherwise, provisions for dotal slaves, moderate repairs to dotal buildings, or even the cultivation of land would reduce the dowry; for all these are in the category of necessary expenses.

The property itself is held to provide something, so that you will not be held to have spent money on it; but after the expenses are deducted, you receive a smaller return from it. It is not generally easy in applying this distinction to decide what, but they can be estimated one by one according to their nature and amount.

16 NERATIUS, *Parchments, book 6:* Above all, any expenses incurred by the husband in harvesting the fruits he must pay for himself, even though they were incurred for the purpose of cultivating the land. So expenses are necessary not only when they are incurred for picking the fruits but also where they arise from preserving the property itself, and the husband cannot deduct anything from the dowry because of them.

2

THE ACTION FOR PROPERTY UNLAWFULLY REMOVED

1 PAUL, *Sabinus, book 7:* The action for property unlawfully removed was introduced exclusively as one against a woman who was formerly a wife because it was settled that an action for theft could not be brought against her. Some, like Nerva and Cassius, thought that she did not commit theft, because the partnership for life involved in marriage made her a sort of owner of the property. Others, like Sabinus and Proculus, said she did commit theft, just as a daughter can steal from her father, but that the law does not allow an action for theft here. Julian quite rightly takes this view.

2 GAIUS, *Praetor's Edict, Title on Decisions, book [10]:* For an action against a wife involving *infamia* is refused because of the honorable nature of marriage.

3 PAUL, *Sabinus, book 7:* So if after the divorce a woman appropriates the same property, she will be liable for theft. 1. Again, we can bring an action for theft against a woman where her slave committed the theft. 2. But it is also possible to bring an action for theft against a woman if we become the heir of the victim of the theft or if she stole from us before we married. Still because of the respect due to these people, in each of these cases, we hold that only a *condictio* for theft will lie and not the action for theft itself. 3. It is true, as Ofilius says, that all the property which the woman has consumed, sold, gifted, or used up in any way at all at the time of the divorce should be included in the action for property unlawfully removed. 4. Where a daughter-in-power unlawfully removes property, according to Mela and Fulcinius, an action on the *peculium* should be granted, because it was not proper for her to be liable for theft, or that an action should be given against her for property which has been unlawfully removed. But if a father and his daughter bring an action for dowry jointly, an action should not be granted against him unless he gives security to defend his daughter for the full amount in an action for property unlawfully removed. But where the daughter is dead, according to Proculus, an action should not be given against the father for property unlawfully removed, except insofar as he has been enriched by this

4 POMPONIUS, *Sabinus, book 16:* or where he has committed fraud to prevent it becoming his.

5 PAPINIAN, *Questions, book 11:* Whatever the father receives deriving from property which has been unlawfully removed during his daughter's lifetime can be recovered by an *actio utilis.*

6 PAUL, *Sabinus, book 7:* According to Atilicinus and Fulcinius, this action can be granted to a father-in-law against his daughter-in-law, whenever a dowry is given to a son-in-power. 1. A father-in-law cannot bring an action for theft where property has been unlawfully removed because of a divorce. 2. An action for property unlawfully removed is also granted against a husband. But if he is a son-in-power, will the action be given against him or on the *peculium*? What we said about daughters-in-power

applies here. 3. If a husband dies after the divorce, his heir can bring an action for property unlawfully removed. 4. The woman's heir is also liable on this ground, as he would be in a *condictio* for theft. 5. Where the marriage is dissolved by the death of the husband, his heir can recover the property by an action on the inheritance or an action for production. Aristo quite rightly thinks he can bring a *condictio* against the woman, because she holds it without title. 6. If a woman unlawfully removes property, after her husband's death, she does not commit theft because property from an inheritance which does not belong to anyone yet cannot be stolen; so the heir can bring an action claiming the property as his or an action on the inheritance.

7 ULPIAN, *Sabinus, book 36:* A wife is entitled to an action against her husband for property unlawfully removed, and she can set off in her action what the husband wishes to claim as property unlawfully removed.

8 POMPONIUS, *Sabinus, book 16:* If, when the dowry is paid to the wife or security is given for its payment, it is not specifically stated that the husband has an action for property unlawfully removed, he can still bring this action; for he is granted this action even if there is no dowry. 1. According to Sabinus, if a wife does not return the property she unlawfully removes, she will be found liable for the amount her husband swears to in court.

9 PAUL, *Edict, book 37:* (For it is not fair for the husband to be forced to sell his own property unwillingly even for its full price.)

10 POMPONIUS, *Sabinus, book 16:* So he need not give any guarantee against eviction, because the situation arose out of his wife's obstinacy.

11 ULPIAN, *Edict, book 33:* According to Marcellus in the eighth book of his *Digest*, whether a man expelled his wife from the home or vice versa and removed property, the action for property unlawfully removed will be available. 1. Where anyone starts proceedings for property unlawfully removed, if he would rather tender an oath, the opposing party will be compelled to swear that nothing was removed at the time of the divorce, as long as the person who tenders the oath first takes the oath against false accusations himself. 2. The husband and the wife are both compelled to take the oath. But the father of the person who removed the property need not take the oath, since it would be unjust for a person to take an oath on someone else's behavior. The person who is said to have removed the property is the one who must take the oath. So the heir of the man or woman who is said to have removed it does not have to take the oath. 3. Where someone wants to offer back the oath tendered to him, the praetor will not allow this,

12 PAUL, *Abridgments, book 7:* any more than where someone tenders an oath to someone who is suing him to recover stolen property to see whether he is a thief.

13 ULPIAN, *Edict, book 33:* So according to Labeo, a woman is not allowed to tender back an oath, and the edict is held to establish this.

14 PAUL, *Edict, book 18:* In an action for property unlawfully removed, the husband or the wife will be allowed to tender an oath on certain property and confirm what was said about it.

15 ULPIAN, *Edict, book 34:* It makes no difference here whether the parties live together or separately, since an action for property wrongfully removed is available against a woman who has taken it into a house, where she is not living with her husband. 1. A wife, a daughter-in-law, or a grandson's wife can steal from a husband, a father-in-law, and a husband's grandfather; but they will not be liable for theft, unless the son is emancipated; then where a daughter-in-law commits theft against his father, the action for theft will lie.

16 HERMOGENIAN, *Epitome of Law, book 2:* Where the husband's property is confiscated by the imperial treasury, the wife can only be sued for the simple value of what has been unlawfully removed, although in other cases judgment is given for fourfold damages.

17 ULPIAN, *Edict, book 30:* Where a concubine unlawfully removes property, we hold

her liable for theft. Consequently, we say that whenever a marriage is void, for example, where a ward marries her tutor or where marriage takes place contrary to the law or is otherwise invalid, the action for property unlawfully removed will not lie, since the action for theft does. 1. When we speak of property wrongfully removed, we mean not only the property a woman removes when she decides to obtain a divorce but also that which she removes while she is still married, if when she leaves him, she hides this property. 2. According to Julian, an action for property unlawfully removed includes not just existing property but also those which have in the course of things ceased to exist. He says that a *condictio* for a fixed sum can be brought here. 3. Where a woman unlawfully removes property which has been pledged to her husband, she will be liable on this action.

18 PAUL, *Questions, book 6:* The owner also has a *condictio* here, but either of them can sue.

19 ULPIAN, *Edict, book 34:* If a woman lets thieves into her husband's house at the time of divorce and uses them to remove the property, even if she does not handle it herself, she will be liable to an action for the unlawful removal of property. So it is true, as Labeo states, that a wife is liable to an action even where the property does not pass to her.

20 MARCELLUS, *Digest, book 7:* If a wife removes property her husband bought in good faith or uses a thief to do this in order to obtain a divorce, judgment will be given against her in an action for property unlawfully removed.

21 PAUL, *Edict, book 37:* A woman thought her husband would die and secretly removed some of his property. If she gets a divorce and her husband recovers, an *actio utilis* for property unlawfully removed should be granted to him. 1. Where a slave belonging to a wife removes property of her husband on her instructions since she wants a divorce, according to Pedius, he has not committed theft, since he does not get any benefit from it. He is not held to have helped to commit theft, as the woman herself did not commit theft, although a slave should not obey his owner who orders him to commit a crime; but an action for property unlawfully removed will lie. 2. Still, if a slave who has been given as a dowry steals from the husband and the wife knew of his character, she must compensate her husband for the whole of the loss. But if she was not aware of his character, she will not be liable for anything other than noxal surrender. 3. The action for property unlawfully removed is brought for compensation for loss, even though an action for dowry can be brought later. 4. If, where property has been unlawfully removed by his wife, the husband loses some advantage, this must be taken into consideration. 5. Although this action is delictal, it includes a claim for property, and so it does not cease to be available after one year like the *condictio* for theft. Again it is available to heirs. 6. Neither the husband nor the wife get any benefit from insolvency in this action, because it is based on theft.

22 JULIAN, *Digest, book 19:* If a man sues his wife for unlawful removal of property and a valuation is made in court, would she have an action to recover this property if she lost possession? This question interests me, because she obtained possession by fraud. I replied that where anyone pays the amount the property was valued at in court, he should be thought of as a buyer. So if the woman sued for property unlawfully removed pays its valuation in court, she will have a defense against the husband or his heir if either of them claims it as his own. If she loses possession, she should be granted a real action. 1. Where a woman unlawfully removes property in anticipation of her husband's death and he dies, the heir can recover whatever has been removed by an action on the inheritance or one for production.

23 AFRICANUS, *Questions, book 8:* Where a marriage has been re-established but a second divorce takes place, an action is still held to exist for property removed at the time of the first divorce as well as for expenses incurred or gifts made during the previous marriage.

24 ULPIAN, *Rules, book 5:* The husband has a claim for recovery as well as a *condictio*

against his wife for property unlawfully removed whether it was his own or was dotal, and he can choose which action he will bring.

25 MARCIAN, *Rules, book 3:* The action for property unlawfully removed is available where it was removed so as to obtain a divorce, and the divorce actually took place. But if the wife takes away her husband's property during the marriage, although the action for unlawful removal does not lie, the husband can bring a *condictio* to recover his property; for I hold that in accordance with the *jus gentium*, property can always be recovered by a *condictio* from people who possess it without proper title.

26 GAIUS, *Provincial Edict, book 4:* The action for property unlawfully removed is a *condictio.*

27 PAPINIAN, *Replies, book 4:* The action for property unlawfully removed does not differ from that in which a woman is accused of the crime of adultery.

28 PAUL, *Questions, book 6:* Where a wife steals her husband's property from someone to whom he lent it for use, he will be entitled to an action for theft although her husband is not.

29 TRYPHONINUS, *Disputations, book 11:* The valuation of property unlawfully removed should be reckoned on the basis of the time it was taken; for the woman has really committed theft, even though she receives a lighter penalty. So property unlawfully removed cannot be usucapted by a possessor in good faith. But where it increases in value and is not returned, the valuation will also be increased, as in the case of a *condictio* for stolen property.

30 PAPINIAN, *Questions, book 11:* Where an action for property unlawfully removed is brought against the woman after the marriage has broken down, it will lapse if the marriage is re-established again.

3

THE RECOGNITION AND MAINTENANCE OF CHILDREN, PARENTS, PATRONS, AND FREEDMEN

1 ULPIAN, *Edict, book 34:* The *senatus consultum* on the recognition of children has two parts, one of which is about recognition by parents and the other concerns women who substitute spurious children. 1. It allows the woman or her father, where she is in power, or anyone with a mandate from them, to notify the husband or his father, where he is in power, within thirty days of the divorce where she thinks she is pregnant. Notification can be left at his house if he is unavailable. 2. We must take the term "house" to mean his lodgings, if he lives in the city; if he does not live there but in a country house or a municipality, the place where the parties set up house during the marriage. 3. A woman should only notify the husband that she is pregnant by him. She does not give notice of this so that the husband can send observers; it is sufficient for her to inform him that she is pregnant. It is then up to the husband either to send observers or to notify her that she is not pregnant by him. This notification can be made by the husband or someone else on his behalf. 4. If the husband does not send observers or notify her that she is not pregnant by him, the penalty is that he is compelled to recognize the child. If he does not recognize him, he will be punished severely. So he should reply or get someone to reply for him to the effect that the woman is not pregnant by him. If this is done, it will not be necessary to recognize the child unless it is really his. 5. Note that the notice does not come from the husband, but from the wife. 6. If the husband offers people to watch over his wife and she does not allow this, or if she does not notify him of her condition, or if she gives him notice but

does not accept the observers appointed by the court, the husband or his father is free not to recognize the child. 7. If a woman does not give notice of her pregnancy within thirty days but announces this later, she should be heard after proper cause is shown. 8. But if she fails to give notice at all, according to Julian, this does not prejudice the child at all. 9. We should take the thirty days after divorce to be continuous and not working days. 10. In the nineteenth book of his *Digest*, the following neat point is put by Julian. If a woman does not notify her husband of her condition within thirty days but has a child within that period, will the *senatus consultum* apply? He says that the *senatus consultum Plancianum* will not apply because it was not seen to deal with a child who was born within thirty days, since the senate established the thirty days for notification of pregnancy. But I do not think this will in any way prejudice the child. 11. Just as, on the other hand, if the husband after getting notice from his wife sends observers, this will not prejudice him in any way. He will then be allowed to deny that the child is his, and it will not prejudice him because he sent observers to the birth. This view is also mentioned by Marcellus in the seventh book of his *Digest*; for he says that if someone denies that the woman is his wife or that she is pregnant by him, it is quite proper for him to send observers without prejudice to himself, especially if he protests at the same time as he sends them. 12. According to Julian in the nineteenth book of his *Digest*, it is laid down in the *senatus consultum* that if the woman notifies her husband that she is pregnant by him and, having been notified, he does not send people to watch and examine her and does not state before witnesses that she is not pregnant by him, he will be forced to recognize the child when it is born. But it does not follow that if he says the child is his, he must make him his heir although he was someone else's child. But when the case comes to court, the father's admission will give rise to a strong presumption in favor of the child. 13. He also says that on the other hand, where a woman does not comply with the *senatus consultum* after a divorce, the father has the right not to recognize the child. It does not follow from this that after the child is born, it cannot be declared his, but only that the father will be forced to support the child if it is proved to be his. 14. Julian also writes that if a woman notifies her husband that she is pregnant and he does not deny it, this will not make the child his, although he can be compelled to support it. It would, however, be most unfair for the child to be his heir when a man has been absent for a long time, and on his return finds his wife pregnant and so rejects her, but without complying with the *senatus consultum*. 15. It is clear from this that the child is not prejudiced if the wife fails to comply with any rules laid down by the *senatus consultum* when the child is the husband's not just as to his legal rights or even his maintenance as laid down in the rescript of the deified Pius. Or if the husband fails to do what the *senatus consultum* prescribes, he can be compelled to support it but refuse to accept it. 16. Clearly, if after a woman has notified him, he denies that she is pregnant by him, even if he does not send observers, he cannot prevent an inquiry being made to discover whether the woman is pregnant by him or not. If the case is brought to court and a decision is reached on the point whether she is pregnant by him or not, a finding in her favor means he must recognize the child, whether it is his or not.

2 JULIAN, *Digest, book 19:* This applies to all circumstances (so the child will be related to his brothers by blood).

3 ULPIAN, *Edict, book 34:* But if it is decided that the child is not the husband's, though he really is, it is settled that a decision of this kind is law. Marcellus agrees with this in the seventh book of his *Digest*, and we still follow this rule. 1. Because the *senatus consultum Plancianum* applies to children born after a divorce, another *senatus consultum* was passed during the reign of the deified Hadrian saying that

even children born during the marriage must be recognized. 2. What if a child is born after his father's death and during his grandfather's lifetime in whose power it would be, if it were proved to be the issue of the grandfather's son? What are we to say? Clearly, the appropriate view is that the question of recognizing it by these methods should be left to its grandfather. 3. What if in this case the question arises whether the child was born during the marriage or after it? The *senatus consultum* on this should be followed. 4. What if there is dispute about whether the woman was his wife? Julian told Sextus Caecilius Africanus that a preliminary inquiry was appropriate here. 5. These *senatus consulta* are not applicable after the death of the father, if there is no relative under whose authority the child can be placed. What claim to the estate could a child assert here? Could he make such a claim whether he was the child of the person whose inheritance he claims or not? What Julian wrote in the nineteenth book of his *Digest* is true insofar as if proceedings for the recognition of the child have been started during the father's lifetime and he dies before a decision was reached, the Carbonian Edict must be consulted. 6. These *senatus consulta* also apply to children born *sui heredes*. The better view is that these *senatus consulta* do not apply where those in question are not in power.

4 PAUL, *Views, book 2:* It is not just a person who smothers a child who is held to kill it but also the person who abandons it, denies it food, or puts it on show in public places to excite pity which he himself does not have.

5 ULPIAN, *Duties of Consul, book 2:* If anyone asks his children to support him or children seek support from their father, a judge should look into the question. 1. Should a father be forced to support only children in his power or should he also support children who have been emancipated or have become independent in some other way? I think it is better to say that even where children are not in power, they must be supported by their parents and they, on the other hand, must support their parents. 2. Must we support only our fathers, our paternal grandfathers, paternal great-grandfathers, and other relatives of the male sex, or are we compelled to support our mothers and other relatives in the maternal line? It is better to say that in each case the judge should intervene so as to give relief to the necessities of some of them and the infirmity of others. Since this obligation is based on justice and affection between blood relations, the judge should balance the claims of each person involved. 3. The same is true in the maintenance of children by their parents. 4. So we force a mother to support her illegitimate children and them to support her. 5. The deified Pius also says that a maternal grandfather is compelled to support his grandchildren. 6. He also stated in a rescript that a father must support his daughter, if it is proved in court that he was really her father. 7. But where a son can support himself, judges should decide not to compel the provision of maintenance for him. So the Emperor Pius stated in a rescript: "The appropriate judges before whom you will appear must order you to be supported by your father according to his means, provided that where you claim you are a tradesman, it is your ill health which makes you incapable of supporting yourself by your own labor." 8. If a father denies that the person seeking support is his son and so maintains that he need not provide it, or where a son denies that the person seeking support is his father, the judges must decide this summarily. If it is established that the person is a son or a father, they must order him to be supported. But if this is not proved, they should not award maintenance. 9. Remember if the judges declare that support must be provided, this does not affect the truth of the matter; for they did not declare that the person was the man's son, but only that he must be supported. The deified Marcus also stated this in a rescript. 10. If anyone refuses to provide support, the judges must determine the maintenance according to his means. If he fails to provide this, he can be forced to comply with the judgment by the seizing of his property in execution and selling it. 11. The judge must also decide whether a relative or a father has any good reason for not supporting his children.

There is a rescript addressed to Trebatius Marinus stating that a father can properly refuse to support his son if the son has informed against him. 12. It is stated in certain rescripts that a father can be forced by a judge not only to furnish provisions but to attend to all the other needs of his children. 13. If a son has been emancipated before reaching puberty, he can be compelled to support his father if he is in need. For everyone would quite rightly say that it would be most unfair for a father to remain in need while his son was in funds. 14. If a mother who has supported her son sues his father for maintenance, she should get a hearing in certain circumstances. The deified Marcus stated in the rescript addressed to Antonia Montana: "The judges will estimate how much you are to be paid by your daughter's father on the basis of the amount of necessary provisions you supplied her for her support. But you cannot obtain as much as you might have spent on your daughter out of motherly love, even if she had been brought up by her father." 15. It is the duty of a son in the army to support his parents, provided he is in funds. 16. It is stated in a rescript that although it is only natural for a parent to be supported by his son, the son need not pay his debts. 17. Another rescript states that the son's heirs should not be compelled to provide, against their will, the maintenance a son would provide out of filial duty if he were alive, unless the father is extremely poor. 18. Judges usually deal with the issue of maintenance between patrons and freedmen. So if patrons deny that the people in question are their freedmen, the judges must look into the matter, and if it is proved that they are their freedmen, then they must order them to be supported. An award of maintenance, however, does not prevent the freedman who denies that he is one from having this investigated first. 19. Maintenance must be provided by freedmen according to their means for their patrons who are in need. But if they are able to support themselves, there is no need for a judge to intervene. 20. Is it only patrons who are to be maintained or must their children also be maintained? I think that after proper cause has been shown, judges should decree that the children of patrons should also be supported, not as readily as in the case of patrons but on some occasions. For freedmen should show respect for the children of patrons as well as patrons themselves. 21. A woman's freedman must support her children. 22. If anyone wants to be supported by his freedman's freedman or by a slave whom he manumitted under a *fideicommissum* or by someone who bought his own freedom himself, he should not get a hearing. For as Marcellus says, he is like the person who by demanding payment loses his rights over a freedman. 23. If the son of a patron has accused his father's freedman of a capital crime, he denies that the freedman has to support him. 24. A freedwoman must also support her patron. 25. An *arbiter* is usually appointed to decide the issue of the support of a patron, and he must assess the value of the freedman's resources so as to determine the amount of the maintenance, and this must be provided as long as the freedman can do it and the patron needs it. 26. Freedmen must support the father and mother of their patron where they are in need and the patron and his children are not in funds, where the freedmen have the means themselves to do this.

6 MODESTINUS, *Manumissions, sole book:* By refusing to provide support when his freedman asks for it, a patron suffers the loss of his right to the services imposed in return for manumission and the estate of the freedman. But there is no necessity for him actually to provide support even if he is able to do so. 1. A *constitutio* of the Emperor Commodus declares: "Where it is proved that a patron has been violently attacked by his freedman or badly beaten or abandoned while suffering from the effects of poverty or illness, he must first be placed in his patron's power again and forced to serve him as a master. If he does not take this warning, he should be sold on the authority of the consul or the governor and the price given to the patron."

7 MODESTINUS, *Replies, book 5:* If the person who is said to have been a woman's husband denies that marriage had taken place, because he is ready to show that the woman who claims she was his wife is a slave, he must support her children in the meantime. But if she is proved to be a slave, the person who took charge of providing for them will not be prejudiced by this decision.

8 MARCELLUS, *Lex Julia et Papia, book 1:* The position of children in the female line is unlike that of the children of our male offspring, who are our responsibility. For clearly, the responsibility for a daughter's child lies not with its maternal grandfather but its father, unless he is dead or in need himself.

9 PAUL, *Rights of Patrons, sole book:* Patrons and their children have no right to the property of their freedmen during their lifetime unless they prove to the court that they are so ill or poor that they should receive monthly provisions from their freedmen to help them out. This rule is clearly stated in several imperial *constitutiones.*

4

THE EXAMINATION OF PREGNANT WOMEN AND THE OBSERVATION OF DELIVERY

1 ULPIAN, *Edict, book 24:* In the time of the deified brothers, a husband said his wife was pregnant, but the wife denied it. On being consulted about this, they addressed a rescript to Valerius Priscianus, the urban praetor, which stated: "Rutilius Severus seems to be asking for something new in applying for a person to observe his wife whom he has divorced and who asserts that she is not pregnant. So no one will be surprised if we suggest a new plan and remedy. If the husband persists in this demand, it will be best for the house of an extremely respectable woman to be chosen into which Domitia will go, and that three skilled and trustworthy midwives selected by you examine her. If all of them or two of them announce that she appears to be pregnant, the woman must be asked to allow an observer in just as if she wanted this herself. If she does not give birth, the husband should be aware that his reputation and honor are involved, and he will quite rightly be held to have devised this to injure his wife. If, however, all of the women or the majority of them declare that she is not carrying a child, there will be no reason for an observation." 1. It is quite clear from this rescript that the *senatus consulta* on the recognition of children will not apply if the woman pretended she was not pregnant or even denied it. This is not unreasonable, since the child is part of the woman or her insides before it is born. After the child is born, the husband can legally demand the boy from the woman by using an interdict, or have the child shown to him or be allowed to remove him. Thus, the emperor provides a procedure *extra ordinem* here where necessary. 2. In accordance with this rescript, a woman can be summoned to appear before the praetor and interrogated as to whether she thinks she is pregnant, and she must answer. 3. What if she does not answer or appear before the praetor? Should we apply the penalty laid down by the *senatus consultum,* that is, that the husband will be allowed not to recognize the child? Suppose the husband is not happy with this, but wants to be a father rather than lose his son? The woman will then be compelled by praetorian procedures to come to court and if she cares, to answer. If she refuses, her property should be seized as a pledge and sold, or a fine imposed. 4. What if on being interrogated she says she is pregnant? The procedure laid down in the *senatus consultum* should then be followed. But if she denies it, in accordance with this rescript the praetor must summon midwives. 5. Note that neither the husband nor the wife is allowed to summon midwives, but they must all be summoned by the praetor. 6. Similarly, the praetor must choose the house of a respectable matron where the woman must go to be examined. 7. What if the woman will not allow herself to be examined or will not go

to the house? Here again the authority of the praetor is needed. 8. If all of the midwives or the majority of them declare that she is not pregnant, can she bring an action for insult? I think it is better to say that she can bring an action for insult if the husband intended to insult her here. But if he did not intend to insult her, but actually believed she was pregnant because of his great desire to have children or because she herself induced this belief by pretending during the marriage that this was so, he will be excused with perfect justice. 9. But remember that no time limit has been fixed by the rescript, although in the *senatus consulta* on the recognition of children, the woman had a period of thirty days. What is the position? Should we say a husband can summon his wife before the praetor at any time, or shall we give him thirty days for this? I think that where proper cause is shown the praetor should hear the husband after thirty days. 10. As regards the examination of pregnant women and the observation of delivery, the praetor says: "If a woman claims she is pregnant after her husband's death, she must take care to notify the parties interested or their procurators within a month so that they can send people to examine her if they want to. They can send up to to five freeborn women only, and they can all examine her at once, but while doing so, none of them must touch the woman's stomach without her consent. The woman must give birth in the house of a very respectable woman appointed by me. The woman must notify the parties interested or their procurators thirty days before she expects to give birth, so that they can send people to observe the delivery if they want to. The room where the woman is to give birth must have only one entrance. If there are more, they must be boarded over on either side. Three freeborn men and three freeborn women with two companions must keep watch in front of the door of this room. Whenever the woman enters the room or leaves it to have a bath, the observers can examine it beforehand if they want to, and can search anyone who goes in. The observers placed outside the room can search everyone who enters the room or the house if they want to. When the woman goes into labor, she must notify all the interested parties or their procurators, so that they can send people to be present at the birth. Up to five freeborn women can be sent so that as well as the two midwives, there are not more than ten freeborn women in the room, and not more than six female slaves. All of those who are going to enter the room must be searched in case they are pregnant. There must be at least three lights in the room." For darkness is better suited to substitution of a child. "When the child is born, it must be shown to all interested parties or their procurators, if they wish to see it. The child is to be brought up by whomsoever its parent directs to do this. If the child's parent gives no instructions on this or the person chosen will not take charge of him, he will be brought up by someone appointed by me after cause is shown. The person who is to rear the child must produce it twice a month until it is three months old, and then once a month until it is six months old and between the ages of six months and one year, every other month. Between then and the time the child can speak, he must produce it once every six months, whenever he wants to do so. If anyone is not allowed to examine the woman to send observers or be present at the delivery or anything is done to prevent the above mentioned procedure, where cause has been shown I will not grant the actions which I promise to those to whom *bonorum possessio* has been given on the basis of my edict." 11. Although the praetor's edict is quite clear on this, its interpretation should not be neglected. 12. So the woman must notify those in whose interest it is that she does not have children or those who would get the whole or a part of the inheritance on intestacy or under a will. 13. But if a slave is instituted heir, according to Aristo, the praetor can allow the slave to take some but not all of the precautions connected with the observation of the delivery. I think this opinion is correct; for it is in the public interest that there should be no substitution of a child, so that dignity of social classes and families can be preserved. So where a slave of this kind has been given a chance to succeed, he should be heard no matter who he is, since he is acting in

the public interest as well as his own. 14. She must also notify those who are next in line of succession, for example, the person first instituted as heir (but not a substitute) or if the head of a household has died intestate, the people who are first in line of succession to him. If several people are entitled to succeed together, they must all be notified. 15. Where the praetor says that he will not grant possession after hearing a case or will refuse certain actions here, where through rusticity, something has been omitted which the praetor says should be done, this does not prejudice the child. For what kind of rule would it be if one of the provisions of no real consequence which the praetor says should be observed is not obeyed and *bonorum possessio* is refused to the child as a result? But the local custom is to be followed and the pregnancy, delivery, and infancy dealt with accordingly.

2 JULIAN, *Digest, book 24:* The edict on the observation of pregnant women partially repeals the one passed on the basis of the Carbonian Edict. 1. At times the praetor should dispense with these rules where the woman is not examined or the birth observed not because of the woman's malice but because of her ignorance.

3 PAUL, *Plautius, book 14:* A person who is the substitute for an unborn child or has been instituted along with the unborn child is to be heard if he wishes to have the woman watched.

4 SCAEVOLA, *Digest, book 20:* A man who provided that if he died without leaving children, whatever property he had should be left to his sister under a *fideicommissum*, died having instituted a posthumous heir and other substitutes. When the deceased's wife claims she is pregnant, should the sister or her procurator be allowed to examine the woman and observe the birth under the edict? I replied that in a case of the kind mentioned, it could be held that the solicitude of the person charged with the *fideicommissum* should be noted and the request granted if proper cause has been shown.

5

WHERE A WOMAN IS PLACED IN POSSESSION ON BEHALF OF HER UNBORN CHILD, AND THIS POSSESSION IS SAID TO HAVE BEEN FRAUDULENTLY TRANSFERRED TO ANOTHER PERSON

1 ULPIAN, *Edict, book 34:* In this edict, the praetor quite rightly provided against the possession he grants on behalf of a child becoming an opportunity for others to plunder the inheritance. 1. He, therefore, established an action against a woman who fraudulently transfers this possession to someone else. The praetor not only exercises his authority over the woman herself but also any person in whose power she is, that is, where someone else obtains possession because of their fraud, and he will grant an action against them to the extent of the claimant's interest. 2. The praetor adds, of course, that if anyone has fraudulently obtained possession, he must give it up. But he will force him to give it up not by exercising praetorian power or magisterial authority but he can do this in a more effective way where by granting an interdict he makes the person use ordinary procedure. 3. It is in the claimant's interest that someone else does not obtain possession where that person has consumed fruits collected in good faith or where a plunderer has obtained possession and the fruits cannot be recovered from him because he is insolvent. 4. This action will be granted even after a year has passed, because its purpose is the recovery of property. 5. If a daughter-in-power has committed the fraud, an action will be granted against the father if he obtains any of the property.

2 PAUL, *Edict, book 37:* A woman does not act fraudulently where she fails to prohibit

someone obtaining possession, but she does commit fraud where she puts a person in possession with intent to deceive someone and by means of some machination or other. 1. If a father and his daughter are proved to have committed fraud, an action can be brought against whichever of them the claimant chooses, since it is granted for the claimant's interest. So he can claim anything he has lost to paternal power. But this action will not lie for expenses beyond the bringing of the case.

6

WHERE A WOMAN IS SAID TO HAVE OBTAINED POSSESSION ON BEHALF OF HER UNBORN CHILD BY A FALSE STATEMENT

1 ULPIAN, *Edict, book 34:* If a woman seeks possession on behalf of her unborn child and in reply to the heir's accusations she swears she is pregnant, the oath must be upheld, and she will not be liable on the ground that she obtained possession by a false statement, and no compulsion should be applied after the oath. If she does give birth, an inquiry can be made on whether she was made pregnant by her husband; for an oath between two people cannot either benefit or adversely affect, so the child will not suffer. 1. This edict has the same basis as the former one; for since it is easy to grant a woman *bonorum possessio* on behalf of her unborn child, the praetor should not let her false statement go unpunished. 2. A woman is held to have obtained possession by a false statement where she seeks possession knowing full well that she is not pregnant. 3. The praetor will grant this action within the appropriate year but not after it, because it is penal. 4. Similarly, the praetor will grant an action for the claimant's interest here. 5. The praetor will also grant an action against the father if she obtained possession falsely because of him. 6. This action is available to anyone who is interested in her not obtaining possession, for example, a co-heir who is waiting for offspring or a substitute or a person who could succeed on intestacy in the absence of the child. 7. The claimant's interest is primarily in the maintenance which is demanded for the pregnancy, because this cannot be recovered unless she obtained possession by a false statement. If there was none, she need not pay anything because she obtained support on the pretext of being pregnant. 8. A person's interest is sometimes greater, where, for example, he is prevented from inheriting because of doubts about the woman's pregnancy. According to Julian, this action should be granted to the heir of the person excluded here, if it was in his interest as well that the woman did not obtain possession by means of a false statement, because if this did not happen, by accepting the inheritance the instituted heir would leave a more valuable inheritance to his own heir. The woman is also liable for the reduction in the value of the inheritance if because of the unborn child the heir did not accept the inheritance. 9. Julian also says in the nineteenth book of his *Digest* that if a substitute died while the woman was in possession of the inheritance, his heir can demand its value from the woman by means of the same action. 10. But do legacies and other charges on the inheritance fail here? It seems to me the legatees can use this action against the woman, because it is in their interest that the inheritance is accepted. 11. Clearly, slaves who have been freed must be protected against the person who brought an action on the inheritance, that is, the person who received their value must carry out their manumission as a *fideicommissum.* But I think the praetor should also hold those who have been directly manumitted, so that their freedom is protected by his intervention. 12. Where a daughter-in-power has been fraudulent and her father participated in the fraud, he will be liable on his own account.

7

CONCUBINES

1 ULPIAN, *Lex Julia et Papia, book 2:* Can a woman living in concubinage leave her patron against his will and either marry someone else or become his concubine? I think that a concubine should not be granted the right to marry if she leaves her patron without his consent, since it is more respectable for a freedwoman to be her patron's concubine rather than the mother of a family. 1. I agree with the view of Atilicinus that it is only women who have not been debauched that can be kept as concubines without fear of committing a crime. 2. Where a man keeps a woman who has been convicted of adultery as a concubine, I do not think the *lex Julia* on adultery will apply, although it will if he marries her. 3. If a woman has been her patron's concubine and then becomes his son's or grandson's or vice versa, I do not think she is behaving properly, since a relationship of this kind is almost criminal. So this sort of bad behavior is prohibited. 4. Clearly, a man can keep a concubine of any age unless she is less than twelve years old.

2 PAUL, *Lex Julia et Papia, book 12:* If a patron who has a freedwoman as his concubine becomes insane, it is more humane to say that she is still his concubine.

3 MARCIAN, *Institutes, book 12:* Another person's freedwoman can be kept as a concubine as well as a freeborn woman, especially where she is of low birth or has been a prostitute. But if a man would rather have a freeborn woman with respectable background as his concubine, he will not be allowed to do this unless he clearly states the position in front of witnesses. But it will be necessary for him to marry her, or if he refuses, to commit debauchery with her. 1. A person does not commit adultery by having a concubine; for because concubinage exists because of statute law, it is not penalized by statute, as Marcellus states in the seventh book of his *Digest.*

4 PAUL, *Replies, book 19:* A woman must be considered a concubine on the basis of intention alone.

5 PAUL, *Views, book 2:* A man can have a concubine in the province where he holds office.

BOOK TWENTY-SIX

1

TUTELAGES

1 PAUL, *Edict, book 38:* Tutelage is, as Servius defines it, force and power granted and all owed by the civil law over a free person, for the protection of one who, on account of his age, is unable to protect himself of his own accord. 1. So tutors are those who have this force and power, and take their name from the office itself; therefore, they are called "tutors," that is, *tuitores*—protectors—and defenders, just as sacristans are called *aeditui* because they protect a temple or *aedes*. 2. A dumb man cannot be appointed as a tutor, since he cannot give authorization. 3. Most authorities, including Pomponius, in the sixty-ninth book of his *Edict*, are of the opinion that a deaf man cannot be appointed as a tutor, since a tutor's duty is not only to speak, but also to listen.

2 POMPONIUS, *Sabinus, book 3:* A *pupillus* is not required to request a tutor for himself or to seek out his tutor.

3 ULPIAN, *Sabinus, book 37:* If a person who has a tutor, whether *pupillus* or *pupilla*, becomes a lunatic, he is in a position where he, nonetheless, should remain in tutelage; this was the opinion of Quintus Mucius and approved by Julian, and we follow the principle that curatorship is redundant if the age of the person concerned requires tutelage. Therefore, if they have tutors, they are not admitted into care on account of their lunacy, but if they do not have them and become lunatics, nonetheless, they are able to receive tutors, since the *Law of the Twelve Tables* is understood not to apply to *pupilli* or *pupillae*. 1. Thus, because we do not allow agnates to be curators over the persons of *pupilli*, for that reason I also think that if someone under twenty-five becomes a lunatic, he should be given a curator, not as a lunatic, but as an *adulescens*, as though the difficulty were one of age. Thus, we shall explain that where a person's age subjects him to care or tutelage, it is not necessary to find him a curator, as for a madman, and the Emperor Antoninus issued a rescript to this effect, since for the meantime one must give thought more to his age than to his insanity. 2. If a *pupillus* or *pupilla* wishes to go to law with his or her legally appointed tutor, or the tutor with either of them, and a curator is requested for the case, should he be appointed only at the request of the *pupilli* themselves, or indeed at that of the opponent also? It must be understood that, whether they are the plaintiff or the defendant, such a curator may be appointed, but not unless the person to whom he ought to be appointed himself makes the request. Finally, Cassius, in his sixth book, wrote that no one could be appointed as a curator of this sort except when present, and only to a person both present and making such a request, and therefore, one cannot be appointed to an *infans*. Cassius also says that if a *pupillus* does not wish to request a curator, so that an action may not be brought against him, he must be compelled by the praetor to do so. 3. Such a curator can be appointed in any place and at any time, wrote Pomponius in the sixteenth book of *Sabinus*. 4. If a *pupillus* requests a curator of this sort but does not add for what case, is he appointed for all disputes? Celsus says that Servius decided that he was held to have been appointed for all cases.

4 PAUL, *Sabinus, book 8:* The reason why it is said that if a curator is appointed without qualification, he is held to have been appointed for lawsuits as a whole, perhaps has regard to the fact that if there is an action for dividing an inheritance or for dividing common property or for regulating boundaries against the tutor, and if a curator is appointed without qualification, he is curator not only in order that the *pupillus* or *pupilla* might bring an action but also reciprocally that they might be sued. 1. It is possible to request as curator either several persons in the place of several others or one person in the place of several or one person in the place of one other or for one lawsuit or several.

5 POMPONIUS, *Sabinus, book 17:* Once a curator of this sort has been requested, as long as he remains curator, it is not possible to request another person as curator for the same lawsuit. 1. Yet although Titius, for example, has been requested as curator against Seius, this same Titius can be appointed against another tutor, so that in different cases one man holds two curatorships. Indeed, this can also happen where he acts as defendant, if the same man is requested for different lawsuits at different times.

6 ULPIAN, *Sabinus, book 38:* It is true that a tutor can be appointed to mutes, male or female, who are *impuberes*, but it is doubtful whether this authorization can be provided for them. Yet if it can be provided for one who remains silent, it can also be provided for a mute. It is certainly true, as Julian writes in the twenty-first book of his *Digest*, that authorization can be provided even for those who remain silent. 1. It seems right that it should not be possible for a tutor to be appointed by the governors of a province subject to a condition, and if he has been appointed, that the appointment should be invalid; Pomponius agrees but says that the additional phrase which the governors use, "I appoint a tutor, if he gives security," does not contain a condition, but only a reminder that the tutelage can only be entrusted to him if he gives security, that is, that he is not allowed to manage it unless he guarantees that the property will be safe. 2. The appointment of a tutor is not a function of either magisterial or judicial authority, but belongs solely to someone who has been granted it expressly, either by statute or by *senatus consultum* or by the emperor. 3. A tutor can be appointed to a deaf person who is *impubes*. 4. It is clear that a tutor cannot be appointed to someone whose father is in the power of the enemy; but if a tutor is appointed, it can be asked whether the appointment is in doubt. I do not think the appointment is valid, since after the father's return the son falls back into the parental power just as if the father had never been captured by the enemy. Rather a curator for the property ought to be appointed in case he should die in the meantime.

7 ULPIAN, *Disputations, book 2:* If a son-in-power is appointed as tutor by the praetor, and if his father recognizes the tutelage, he ought to be liable for the whole sum; if he does not recognize it, he is liable only as far as the *peculium* is concerned. He is held to have recognized it if he manages it or consents to his son's managing it or expressly interferes with the tutelage. Thus, when he writes to his son that he should manage the tutelage with care, "because you know," he says, "that we can incur a legal risk," I hold that he is seen to have recognized the tutelage; clearly, if he has only admonished his son, the tutelage is not held to have been recognized.

8 ULPIAN, *Opinions, book 1:* A patron who is tutor to his freedman should also demonstrate his good faith, and if anything has been done to defraud the debtors, albeit those of the freedman *pupillus*, public law allows it to be canceled.

9 MARCIAN, *Institutes, book 3:* Proceedings *extra ordinem* are taken against those who are shown to have taken possession of a tutelage for a cash payment, or, for a bribe, to have ensured that someone unsuitable should be appointed as tutor, or against someone who has deliberately diminished the amount of an inheritance by wasting it, or who has alienated the property of the *pupillus* by a manifest fraud.

10 ULPIAN, *Edict, book 2:* Also someone who is not a citizen of a town can be appointed as tutor, provided that he is appointed to a citizen of a town.

11 PAUL, *Vitellius, book 3:* If a lunatic is appointed as tutor, he can be understood to be so appointed when he has returned to his senses.

12 PAUL, *Replies, book 10:* It has been asked whether those who have been appointed

tutors in the place of someone who is absent on public business should continue as tutors on his death or whether others must be requested. Paul replied that those who have been appointed in the place of someone who is absent continue in the same situation, should he fail to return, until the time of puberty.

13 POMPONIUS, *Manual, book 2:* It is even customary for a curator sometimes to be appointed to someone who has a tutor on account of the tutor's ill-health or extreme age; such a person is understood to be more a manager of the estate than a curator. 1. There is also an assistant for tutelage whom the praetor is accustomed to allow the tutors to appoint when they cannot fulfill the administrative duties of the tutelage, but on condition that they appoint him at their own risk.

14 ULPIAN, *Sabinus, book 37:* If *pupilli* have been adopted while still *impuberes*, or banished, they cease to have tutors. 1. Again, if a *pupillus* is reduced to servitude, the tutelage is certainly ended. 2. People can also cease to be tutors in other ways, if, for instance, either the *pupillus* or the tutor has perhaps been captured by the enemy. 3. But if someone is appointed for a fixed period of time, at the end of that period, he ceases to be tutor. 4. Moreover, if anyone is removed as untrustworthy, he ceases to be tutor. 5. But if he has been appointed until a certain condition is fulfilled, it turns out likewise that he ceases to be tutor when the condition is manifestly fulfilled.

15 ULPIAN, *Sabinus, book 38:* If someone who is a tutor has not been captured by the enemy but, when sent to them as an envoy, either was detained by them or deserted, because he does not become a slave, he remains as tutor, but in the meantime another tutor shall be appointed by the governors.

16 GAIUS, *Provincial Edict, book 12:* Tutelage is, for the most part, a masculine office. It must also be understood that no tutelage passes by the law of inheritance to another; but statutory tutelages descend to children of the male sex who are of full age; others do not.

17 PAUL, *Sabinus, book 8:* Many *senatus consulta* have been enacted in order that other tutors should be appointed in the place of one who is a lunatic or dumb or deaf.

18 NERATIUS, *Rules, book 3:* Women cannot be appointed as tutors, because this is a duty for males, unless they petition the emperor especially for the tutelage of their sons.

2

TESTAMENTARY TUTELAGE

1 GAIUS, *Provincial Edict, book 12:* By the *Law of the Twelve Tables*, parents are permitted to appoint by will tutors to their children, whether of the feminine or masculine gender, provided that they are in power. 1. We ought also to know that parents are allowed to appoint tutors by will even to posthumous sons or grandsons or other offspring, so long as they are in the position where, if the offspring had been born in their lifetimes, they would have been in their power and would not make the will void. 2. Nor should one fail to realize that if someone who has a son-in-power and a grandson by him equally in power appoints a tutor for his grandson, he is held to have made a valid appointment, provided that after his death, the grandson would not have fallen into his father's power; this happens if, during the testator's lifetime, the son ceases to be in his power.

2 ULPIAN, *Sabinus, book 2:* The deified brothers issued a rescript to the effect that a soldier cannot appoint a tutor for children who will have fallen into another's power.

3 ULPIAN, *Edict, book 35:* We ought to accept as tutors appointed by will even those who are named in codicils confirmed by the will. 1. But we must accept as appointed by will only those who have been lawfully appointed.

4 MODESTINUS, *Distinctions, book 7:* A father can appoint a tutor for his son, whether he has been instituted heir or disinherited, but a mother can do so only for an instituted heir on the grounds that it seems right to appoint a tutor for the property rather than for the individual. So it will also be necessary to inquire into the tutor who is appointed by the mother's will, although a tutor appointed by the father will be con-

firmed without inquiry, even though he has been appointed less than lawfully, unless his situation, by reason of which it seemed right to appoint him, is changed, for example, if he has become an enemy instead of a friend or a poorer man instead of a rich one.

5 ULPIAN, *Sabinus, book 15:* If a man has appointed tutors to his daughters or sons, he is held to have appointed them even to a posthumous female child, since a posthumous female child is also included in the term daughter.

6 ULPIAN, *Sabinus, book 39:* But what if there are grandsons? One must see whether tutors have been appointed to them also under the title of sons. The better view is that they are held to have been appointed to them also, as long as he said offspring; but if he said sons, they are not included; for sons are named in one way, grandsons in another. Clearly, if he has made the appointment to *postumi*, posthumous sons are included just as much as other offspring.

7 PAUL, *Sabinus, book 3:* Tutors originate not from the heir but from the testator; immediately anyone becomes heir; for the heir himself can be appointed as tutor, and a tutor can properly be appointed after the death of the heir.

8 ULPIAN, *Sabinus, book 24:* A tutor who has already been appointed can be forbidden to act as tutor either by a will or by a codicil. 1. But if a tutor has been appointed conditionally, he will not be tutor if that condition fails. 2. One may appoint a tutor both from a certain date and up to a certain date, and subject to a condition and until a condition is fulfilled. 3. In the appointment of a tutor, should one refer to the least burdensome condition or the most recent, as in the case of a legacy? Consider: "Let Titius be tutor when he is able"; or "let Titius be tutor if the ship comes back from Asia." Julian, in the twentieth book of his *Digest*, correctly writes that one must refer to the most recent piece of writing.

9 POMPONIUS, *Quintus Mucius, book 3:* If no one accepts the inheritance, not one of the clauses of the will is valid; but if one out of a number of heirs accepts, the tutelages are immediately valid, and one need not wait for all to accept the inheritance.

10 ULPIAN, *Sabinus, book 36:* If the inheritance from which a tutor is expected has not yet been accepted, it is correct that another tutor can be appointed, as if there were as yet no tutor, nor the expectation of one. 1. In testamentary tutelage, we follow the most recent appointment, and if a tutor has been appointed very frequently, we pay attention to the most recent piece of writing. 2. When a man has a son and a grandson by him, if he appoints a tutor for the grandson, there is a dispute whether by some chance the appointment might not be valid. For example, suppose that the son has died in his father's lifetime and the grandson by him has succeeded in his grandfather's lifetime. Surely one must say that the will, and also the tutelage, is confirmed in accordance with the *lex Junia Vellea*; for Pomponius also writes in the sixteenth book of his *Sabinus* that the appointment of a tutor is valid. For since the will is confirmed, consequently the appointment of a tutor written in that will, which is valid, will also be valid, that is, where the grandson has been instituted as heir or disinherited by name. 3. If a lunatic is appointed by will as a tutor if and when he has ceased to be a lunatic, Proculus thinks that he has been properly appointed. But if he was appointed without qualification, Proculus says the appointment is not valid. But it is better to say, as Pomponius does, that he appears to have been properly appointed and that he will become tutor at the time when he has begun to be in his right mind. 4. A slave who is the property of another can be appointed tutor in this way: "If he is free, let him be tutor." Furthermore, indeed, if he has been appointed without qualification, this condition, "when he is free," is understood to be included. However, anyone can claim freedom through *fideicommissum* even for a slave not of his own household on these grounds. For what difference does it make whether he has appointed his own slave or another's as tutor, since, through favor to the *pupillus* and the public good, freedom is arrogated to the person of the man who was named as tutor? Therefore, freedom through *fideicommissum* can be claimed for this man also, if the will does not clearly oppose it.

11 ULPIAN, *Sabinus, book 37:* If someone has appointed a tutor conditionally or from a certain date, in the meantime, another tutor must be appointed, even though the

pupillus has a statutory tutor. For it should be known that as long as a testamentary tutelage is expected, the statutory tutelage is invalid. 1. And if a tutelage has once passed into the testamentary sphere, and then the tutor appointed by the will is granted exemption, we still say that a tutor must be appointed in place of the one who was exempted and that the tutelage does not revert to the statutory tutor. 2. We say the same even if he has been removed from office; for he leaves it for this very reason, that another should be appointed. 3. But if a tutor appointed by will dies, the tutelage reverts to the statutory tutor, because here the *senatus consultum* is invalid. 4. Clearly, if there are two or more testamentary tutors, another can be appointed in the place of one who dies or ceases to live in the city; but if not one remains alive or in the city, the statutory tutelage succeeds.

12 ULPIAN, *Sabinus, book 38:* A tutor cannot be appointed by will for specific properties or purposes nor when some properties are excluded,

13 POMPONIUS, *Sabinus, book 17:* and if he is appointed, the entire appointment will be null and void

14 MARCIAN, *Institutes, book 2:* because he is appointed for the individual, not a property or a purpose.

15 ULPIAN, *Sabinus, book 38:* But if a tutor is appointed for the African property or the Syrian property, the appointment is valid, for this is allowed.

16 ULPIAN, *Sabinus, book 39:* If a man appoints a tutor in these words, "I appoint a tutor to my sons," he is in a situation where he is held to have appointed him as much for his sons as for his daughters; for daughters also are included in the term sons. 1. If a man appoints a tutor to his son and he has several sons, is he held to have appointed him to all his sons? Pomponius is doubtful on this point, but the better view is that he is held to have made the appointment for all of them. 2. If a man appoints tutors for his children, or his sons, and he has some who are in the hands of the enemy, he is held to have appointed tutors even for them, if it cannot be clearly proved that the testator had any other intention. 3. If a man appoints tutors for his sons, while ignorant of the fact that he has a son Titius, is he held to have appointed them only for those whom he knows to be in power or also for the one he did not know he had? The better view is that he is held not to have appointed tutors to this one, albeit that the term "sons" extends to him; but because he did not have any intention concerning him, it must be said that the appointment is invalid regarding his person. 4. In the same way, if he was sure that a son, who was still alive, had died, the same must be said; for he cannot be held to have appointed a tutor to one whom he believed to have perished. 5. If he appoints tutors to posthumous children and these are born while he is alive, should the appointment be valid? The better view is that the appointment is valid, even if they are born in his lifetime.

17 ULPIAN, *Edict, book 35:* It is most certainly the case that tutors appointed by will cannot be compelled to give security that the property will be safe; but, nonetheless, when anyone offers to give security, in order to be the sole administrator, he should be allowed to do so, as is provided in the Edict. But it is proper for the praetor to offer these terms to the others also, if they themselves are willing to give security. For if they themselves are ready to give security, they ought not to be prevented by another's offering it freely; but clearly, when the giving of security is implemented by everyone, everyone gives it, so that a person who is content rather to accept security than to give it would be secure. 1. But the man who gives security is not altogether to be given preference; for what if the man to whom the tutelage ought to be entrusted, even without the giving of security, has an untrustworthy or dishonorable character? Or what if he has already committed many disgraceful acts in tutelage? Ought he not rather to be removed and rejected from the tutelage than to administer it alone? Nor should those who do not give security be removed rashly, since tutors who are for the most part well thought-of and suitable and honest ought not to be rejected, even if they do not give security; and furthermore, they should not be ordered to give security. 2. Therefore, there is a double inquiry to be made into the case: the one into the character of the man who has offered security, who he is and what sort of person; the other into that of his fellow tutors and what sort of persons they are and whether they happen to be of such good character and honesty that they ought not to undergo the reproach of giving security.

18 CALLISTRATUS, *Monitory Edict, book 3:* If, however, several are ready to give security, then the more suitable person is to be preferred by comparing the characters of both tutors and guarantors against each other.

19 ULPIAN, *Edict, book 35:* If none of the tutors calls for the giving of security, but someone who is not a tutor appears and asks either that the tutors should give security or, if they do not, that they should entrust the tutelage to him, as he is ready to give security, this should not be allowed. For tutelage ought not to be entrusted to a stranger, nor should tutors appointed by

will be made subject to the giving of security, contrary to the law. 1. This edict concerning the giving of security relates to testamentary tutors, but if tutors are appointed after an inquiry, Marcellus says that this edict relates also to them, and this is indicated in a speech of the deified brothers; and, therefore, the latter tutors also are subject to a clause to the effect that if the majority of the tutors decide upon anyone, he whom the majority have chosen should manage the tutelage, although the words of the edict relate to testamentary tutors. 2. A tutor appointed by will to a posthumous child only becomes tutor when the child is born; yet an action for unauthorized administration against him will be granted to a representative of the *pupillus*. But if the child has been born and then this tutor has been removed from the tutelage before he has done anything, he will also be liable in the same action. If it is clear that he has done something after the birth of the child, he will be liable in an action on tutelage for what he did before also, and his entire administration will come within the scope of this action.

20 PAUL, *Edict, book 38:* It is not possible to appoint an unspecified tutor. 1. We can appoint by will as tutor anyone at all, whether he be praetor or consul, because the *Law of the Twelve Tables* confirms this.

21 PAUL, *Notes, book 8:* One may appoint by will as tutors those persons with whom there is *testamenti factio.*

22 ULPIAN, *Edict, book 45:* If a man appoints as tutor to his son a slave whom he believed to be free, although he was a slave, the latter becomes neither free nor tutor.

23 AFRICANUS, *Questions, book 8:* It is not correct to appoint a tutor in this manner: "Let Titius be tutor to 'A' or 'B,' my sons, whichever of them he wishes." For what shall we say if Titius is unwilling to decide to which of the sons he wishes to be tutor? 1. This is the correct way to appoint a tutor: "Let Titius, if he is willing, be tutor to 'A,' my son."

24 JAVOLENUS, *From Cassius, book 5:* If there are several tutors, it is pointless to ask the praetor for a curator to undertake a lawsuit, since the action can be brought against one tutor on the authority of another.

25 MODESTINUS, *Encyclopaedia, book 4:* If a man is appointed as tutor to two *pupilli*, although he can be excused from the tutelage of one of them, provided the properties are separate, yet he remains as tutor to the other.

26 PAPINIAN, *Replies, book 4:* In our law it is of no effect for the tutelage of the children they have in common to be entrusted to the mother by the father's will; and if the governor of the province, erring through ignorance, has decreed that the father's wish must be carried out, it is not proper for his successor to follow his decision, which our laws do not allow. 1. A tutor whom the father wished to receive accounts from the other tutors to whom he assigned the management of the business is not held to have been appointed honorarily. 2. In order to draw up a suit for an undutiful will for a son who has been disinherited and to whom his father appointed a tutor, this same tutor ought to be confirmed by the praetor; the judgment in the case will show whether he derives his authority from the father's will or the praetor's decree.

27 TRYPHONINUS, *Disputations, book 14:* The same thing will happen, if there is a claim on behalf of the *pupillus* that his father died intestate or the will is called spurious on behalf of the *pupillus*, as long as it is clear that the paternal uncle will be the statutory tutor on intestacy, since a tutor cannot be appointed to one who already has a tutor. For it is more convenient that the very man who is mentioned in the written document should be appointed by the praetor, so that without any preliminary hearing of the case the lawful tutor can give his authorization to the *pupillus* for the lawsuit. 1. However, when the paternal uncle, whom the *pupillus* says is his statutory tutor, himself makes an accusation that the son is supposititious and asserts that the statutory inheritance belongs to him, Julian replies that another tutor must be requested.

28 PAPINIAN, *Replies, book 4:* When a man refuses, by claiming an exemption, to undertake a tutelage assigned to him by will, the legacies which have been left to his sons must also be withheld, as long as the sons have acquired the legacies not through affection toward themselves, but as a compliment to their father. 1. One who has been

manumitted by the provisions of a *fideicommissum* cannot lawfully be appointed as tutor by will; therefore, after his freedom has been bestowed upon him, he is called to the tutelage in accordance with the testator's wish. 2. It is of no effect for a patron to appoint a tutor to a freedman who is *impubes*, but the praetor will follow his wish if the honest findings of an inquiry agree with this.

29 PAPINIAN, *Replies, book 15:* In accordance with the intention of the *senatus consultum* Libonianum, a man who has written in a will that he is tutor to a *pupillus* will not be tutor; since, however, the wish of the father who clearly indicated this very man by his own hand is not in doubt, I replied that although other persons should be tutors, he should be appointed as curator and that the exception which he has by public law should not be allowed, since he seems to have given a promise, nor should he be removed as untrustworthy.

30 PAUL, *Questions, book 6:* There are two men called Titius, father and son; Titius is appointed tutor, and it is not clear of whom the testator was thinking. I ask: What is the legal position? He replied: The man who is appointed is the one whom the testator intended to appoint. If it is not clear, the deficiency is not one of law, but of proof; therefore, neither is tutor.

31 SCAEVOLA, *Questions, book 4:* If a father appoints tutors to his disinherited daughter and his will is said to have been made void by the birth of a posthumous child, it is most appropriate that the same tutors be appointed to the *pupilla* to claim the inheritance on intestacy.

32 PAUL, *Replies, book 9:* I ask whether or not a man can appoint as tutors by will citizens of the same city. Paul replied that he can. 1. Paul also replied that a man who has been appointed tutor to make an examination of the property can lawfully be sued in all matters of administration and acquisition in just the same way as the other tutors who have been appointed in the same will. 2. Lucius Titius instituted his sons of pupillary age as his heirs and appointed tutors for them in these words: "Let Gaius Maevius and Lucius 'Eros' be tutors to my sons," but he did not give this Eros his freedom; Eros was, however, under twenty-five years of age. I ask whether he can claim his freedom. Paul replied that since it is right that a man who has been appointed tutor by his master seems also to deserve his freedom, this man also, about whom the question is asked, should be held to be in the same situation and is indeed free from the time when the inheritance is accepted; but it is after he has reached the statutory age that he is burdened with the tutelage.

33 JAVOLENUS, *From the Posthumous Works of Labeo, book 8:* Tutors were appointed in these words: "I appoint Lucius Titius as tutor. If he is not alive, then I appoint Gaius Plautius as tutor." Titius survived and managed the tutelage, and then he died. Trebatius says that the tutelage does not pass to Plautius, Labeo says the opposite, and Proculus agrees with Labeo. I confirm the opinion of Trebatius, because the words used refer to the time of death of the testator.

34 SCAEVOLA, *Digest, book 10:* When someone has indicated in a codicil that he appoints other tutors, because he has found out that some of those appointed in the will are dead or have grounds for exemption, should those who are alive and have not been exempted nevertheless remain as tutors? He replied that no reason had been proposed why they should not remain.

3

THE CONFIRMATION IN OFFICE OF A TUTOR OR CURATOR

1 MODESTINUS, *Exemptions, book 6:* So that we should make no omissions concerning those who can be confirmed as tutors, let us also look briefly at these persons. 1. There are some people who are properly appointed by will as tutors, that is, by the right persons, to the right persons, in the right way, in the right place. It is proper for a father to appoint by will a tutor to his sons or grandsons whom he has in power. But if the person concerned is either one who does not have the capacity to appoint, such as a mother or a patron or a stranger, or is one to whom a father would appoint a tutor,

such as a son or daughter who is not in power, or if he says, "I ask you to take care of the property," or if I appoint a tutor or curator in an unconfirmed codicil, then the *constitutiones* allow the deficiency to be made good by the power of someone of consular rank, and the tutors to be confirmed according to the wishes of the testator. 2. If it is the father who has made the appointment, for the most part the governor does not hold an inquiry, but simply gives confirmation; but if it is some other man, then he holds an inquiry into the suitability of the person appointed. 3. One must also know that a curator cannot properly be appointed by will, even by a father, but if one is appointed, he is usually confirmed by the governor.

2 NERATIUS, *Rules, book 3:* A woman cannot properly appoint by will a tutor to her children, but if she does appoint one, he will be confirmed after an inquiry by decree of the praetor or proconsul, and he need not give security to the *pupillus* that the property will be safe. 1. Also if a curator is appointed by will by a mother to her sons, he will be confirmed by decree after an inquiry.

3 JULIAN, *Digest, book 21:* A man who has been appointed as tutor by a father, either in an invalid will or not in the manner prescribed by law is to be confirmed as manager of the tutelage just as if he were tutor by will, that is, he should be excused from giving security.

4 PAUL, *Exemptions from Tutelage, sole book:* If a patron or any stranger has appointed a tutor to an *impubes* whom he has instituted as his heir and the *pupillus* has no property apart from this, it will not be wrong to say that one must follow the judgment of the man who both knew the character of the one whom he wished to be tutor and was so fond of the *impubes* that he instituted him as his heir.

5 PAPINIAN, *Questions, book 11:* The praetor ordered magistrates to confirm as tutors those appointed by the will of a paternal uncle; they ought also to take a *cautio*, and the wish of someone who had not the power to appoint a tutor does not excuse negligence on the part of the magistrates. Lastly, the praetor cannot give his decree before the tutors have been pronounced solvent by the inquiry. From this it follows that if they were not solvent at the time of the tutelage, an action in respect of what cannot be recovered from their property should be decreed against the magistrates.

6 PAPINIAN, *Replies, book 5:* If a father appoints a tutor to a son who is *pubes* or a curator to a son who is *impubes*, the praetor ought to confirm them without an inquiry.

7 HERMOGENIAN, *Epitome of Law, book 2:* It is of no effect for a tutor to be appointed by a father to a natural son to whom nothing has been left, nor can he be confirmed without an inquiry. 1. If it is asked whether the tutor has been properly appointed after an inquiry, these four points should be considered: whether the man who appointed him had the power to appoint, whether the person who received him as tutor was the one to whom he ought to have been appointed, whether the man who is appointed was qualified to be appointed, and whether a decree had been issued before the tribunal.

8 TRYPHONINUS, *Disputations, book 14:* When confirming a tutor, the praetor ought to ask whether the father's wish still holds good. This is easily done, if the father made the unlawful appointment of tutors or curators close to the time of his death. If, on the other hand, he did this some years before, so that it has been possible for a diminution to occur in the wealth of the tutor unlawfully appointed by the father, or improbity of character previously concealed or unknown has emerged, or quarrels with the father have flared up,

9 PAUL, *Judicial Examinations, sole book:* or they have engaged in some ruinous contract with the imperial treasury,

10 TRYPHONINUS, *Disputations, book 14:* the praetor follows what is advantageous to the *pupilli* and not what is written in the will or codicil. For the praetor ought to accept the father's wish, as long as he was not in fact ignorant of those facts of which the praetor has full knowledge concerning the tutor. Finally, what if the father afterward wrote of the man whom he had improperly appointed as tutor by will or codicil that he did not want him to be tutor? Certainly, the praetor does not follow the first wish, which the father abandoned.

11 SCAEVOLA, *Digest, book 20:* A grandmother appointed a curator for her grandsons and left him a *fideicommissum.* It was asked whether the curator ought to be compelled to undertake the administration. He replied that he was not in fact curator, but since something had been given to him in the will, he was liable for the *fideicommissum* if he did not undertake the curatorship, unless he refused to claim what had been given to him or was ready to give it back. 1. It was also asked whether this curator ought to give security to the grandsons. He replied that he was not obliged to do so as curator, but since he could be sued for the *fideicommissum,* he ought to give security in the name of the *fideicommissum.*

4

STATUTORY TUTORS

1 ULPIAN, *Sabinus, book 14:* Statutory tutelages are conferred by the *Law of the Twelve Tables* upon agnates and blood relatives, also upon patrons, that is, upon those who can be admitted to a statutory inheritance. This is the highest form of foresight, that those same persons who hope for the succession should look after the property and prevent its being squandered. 1. Sometimes the inheritance belongs in one place and the tutelage in another, as, for example, if the *pupillus* has a female blood relative; for the inheritance in fact belongs to the female agnate, but the tutelage to a male. Also in the case of freedmen, if there is a patroness and a patron's son, then the patron's son will obtain the tutelage and the patroness the inheritance. This will be just as much the case if there is a patron's daughter and a grandson. 2. If there is a brother in enemy hands, the tutelage is not transferred to an agnate of lesser degree, and also if a patron is in enemy hands, the tutelage is not transferred to the patron's son; but in the meantime, a tutor is appointed by the praetor. 3. Sometimes also a tutelage is transferred without an inheritance, sometimes an inheritance without a tutelage, as, for example, in the case of the man who lay hidden when he was asked to manumit his slave; for generally he does not have a patron's rights, as the deified Pius wrote to Aurelius Bassus in these words: "Clearly, the subterfuge of those who wish to frustrate freedom granted by *fideicommissum* is punished in this way by preventing them from acquiring a patron's rights over a man whom they do not wish to be free." It will be the same if a freedman has been assigned to a daughter; the tutelage, in fact, will remain with her brothers, as Marcellus notes, but the statutory inheritance will belong to the sister.

2 ULPIAN, *Sabinus, book 37:* There is no doubt that a statutory tutelage is lost when a *pupillus* suffers a change of civil status, even where this happens without loss of *civitas.*

3 ULPIAN, *Sabinus, book 38:* Statutory tutelage, which is granted to patrons by the *Law of the Twelve Tables,* is not indeed granted specifically or by name, but in consequence of the inheritances which are bestowed on patrons by this very law. 1. Therefore, by the *Law of the Twelve Tables* the person who manumits is tutor, whether he manumitted voluntarily or was compelled to manumit by a case of *fideicommissum.* 2. Even if he bought him on condition that he manumit him and by the *constitutio* of the deified Marcus Aurelius to Aufidius Bassus the man attains his freedom, it must be said that he is tutor. 3. Clearly, if by chance he has attained his freedom by the *senatus consultum Rubrianum,* he will not have as tutor the man who was proposed, but as he has been made an *orcinus libertus,* he will belong to the family of the testator. In this special case, tutelage which did not belong to the patrons begins to belong first to the children of the patron, as indeed happens in the case of all *orcini liberti* manumitted by will. 4. If two or more persons manumit, they are all tutors; but if a woman is among them, it must be said that the males only will be tutors. 5. If one of the patrons dies, the tutelage is in the power of the remaining patrons, even though he leaves a son. But if he has been captured by the enemy, for the meantime his fellow patrons alone are tutors. In a similar way also, if he has been reduced to servitude, it appears that the rest are tutors. 6. But if all the patrons die, then the tutelage begins to belong to their children. 7. Similarly, if one of the patrons leaves a son, the other a grandson, should the tutelage belong to the son alone, or in fact to the grandson also, since the grandson is also next of kin in his father's family? The answer will be clear from statutory inheritance: The statutory inheritance belongs to the son alone. Therefore, tutelage also descends to the son alone, and after the son, then to the grandson. 8. It can

be asked whether, if the patron's son is removed or exempted, the tutelage should be transferred to the grandson. Marcellus is of such an opinion as to write that he cannot succeed; for they have left the tutelage for the very reason that others should be appointed in their place, not in order that succession should be allowed. 9. Succession, however, ought to be allowed in a statutory tutelage not only in case of death but also of change of civil status; therefore, if the next of kin suffers a change of civil status, the one who comes after him succeeds to the administration of the tutelage. 10. If a parent emancipates a son or daughter or grandson or granddaughter or any other *impuberes* whom he has in power, he maintains the position of statutory tutor,

4 MODESTINUS, *Distinctions, book 4:* and on his death, if there are any children of full age, they are made fiduciary tutors for their brother or sister.

5 ULPIAN, *Edict, book 35:* No one appoints statutory tutors, but the *Law of the Twelve Tables* makes them tutors. 1. But it is certain that even they can be compelled to give security, inasmuch as it seems right to most people that even a patron and a patron's son and his other children should be compelled to give security that the property will be safe. But it is better that the praetor, after examining the case, ought to decide whether the patron and his children ought to give security or not, so that, if he is a respectable character he should be excused from giving security, especially if his substance is moderate; but if the patron's character is commonplace or less respectable, then it must be said that the giving of security is relevant, so that either the type of tutelage or the character of the tutor or the situation allows the giving of security. 2. In the case of statutory tutors and those appointed by the magistrates, it is asked whether the tutelage can be decreed to a single man; Labeo says that the tutelage can properly be decreed to a single tutor; for some may be absent or lunatics. This opinion must be allowed for the sake of expediency that the administration should be decreed to a single tutor. 3. Can they, therefore, appeal against each other reciprocally in accordance with the above clause? The better view is that if they have not all given security or if the giving of security has ended (for sometimes the giving of security is not demanded of them, or security ceases to be required, or the municipal magistrates are either unable or unwilling to enforce the giving of security by those whom they have appointed), it can be said that appeal should be allowed even in the case of those who, by some chance, have not given security. 4. Is the same, therefore, to be said in the case of patrons, especially when the giving of security is invalid? I think that in the case of patrons appeal should not be allowed except for very good reason, to prevent anyone diminishing the expectations of the inheritance; for if the tutelage were not entrusted to the patron, it could suffer loss through a fellow patron who, acting alone, mismanages the property of the *pupillus*. 5. If a statutory tutor suffers a change of civil status, it must be said that he ceases to be tutor and that there is scope for an action on tutelage when the tutelage has ended.

6 PAUL, *Edict, book 38:* When a parent dies intestate, the tutelage is conferred upon the agnates. An intestate person is seen not only as someone who has not made a will but also someone who has not in his will appointed tutors for his children; for insofar as concerns the tutelage, he is intestate. We shall say the same if a tutor appointed by will dies while the son still remains *impubes*; for his tutelage returns to an agnate.

7 GAIUS, *Institutes, book 1:* Agnates are those who are linked by blood relationship through persons of the male sex, like cognates on the father's side, such as a brother born of the same father, a brother's son, or a grandson by him, also a paternal uncle, and a paternal uncle's son or a grandson by him.

8 PAUL, *Edict, book 38:* If I leave a son who is *impubes* and a brother and a grandson by another son, it is certain that each of them is tutor if they are of full age, because they are relatives in the same degree.

9 GAIUS, *Provincial Edict, book 12:* If there are several agnates, the most closely related obtains the tutelage, and if there are several in the same degree, they all obtain the tutelage.

10 HERMOGENIAN, *Epitome of Law, book 2:* A closer female relative cannot stand in

the way of an agnate and prevent his being tutor of an *impubes* who is his agnate, and, therefore, a paternal uncle will be the statutory tutor of his brother's son, even when the latter has a full blood sister; nor can a paternal aunt prevent a great uncle, or a maternal aunt prevent her brother's sons, from being tutors. 1. Deaf and dumb persons cannot be statutory tutors since they cannot be lawfully appointed either by will or in any other way.

11 PAUL, *Plautius, book 16:* Someone who is hard of hearing can, however, be tutor.

5

TUTORS AND CURATORS APPOINTED BY THOSE WHO HAVE THE POWER OF APPOINTMENT, WHO MAY BE APPOINTED, SPECIAL CASES

1 ULPIAN, *Sabinus, book 39:* Either a proconsul or a governor or even the prefect of Egypt, or someone who has obtained the proconsulship of a province, either temporarily on the death of the governor, or because the rule of the province has been entrusted to him, has the power to appoint a tutor. 1. The legate of a proconsul also, according to a speech of the deified Marcus, has the power to appoint a tutor. 2. But although the governor of a province is permitted to appoint a tutor, he is permitted to do so only for persons of that same province or those who are domiciled there.

2 ULPIAN, *Edict, book 35:* When certain persons who had been appointed as tutors had lodged an appeal but did not appear in court, the deified Pius issued a rescript to the effect that a temporary tutor should be appointed to manage the tutelage.

3 ULPIAN, *Edict, book 36:* The right of appointing tutors is granted to all municipal magistrates, and we accept this, but only where the man who is appointed by the municipality or district belongs to the same municipality.

4 ULPIAN, *Lex Julia et Papia, book 9:* The praetor has no power to appoint himself as tutor, just as neither a subordinate judge nor an arbitrator can be appointed by his own decision.

5 GAIUS, *Provincial Edict, book 12:* It has always been established that the governor of a province has the power to appoint as tutor someone who is absent as much as someone who is present, and for a *pupillus* who is present as much as one who is absent

6 ULPIAN, *All Seats of Judgment, book 8:* but not without his knowledge and consent.

7 ULPIAN, *All Seats of Judgment, book 1:* A curator ought to be appointed to give a dowry not only to a woman who is about to marry but also to a woman who is already married. But in this case, he is appointed to increase the dowry, and a curator can also be appointed in order to alter the dowry.

8 ULPIAN, *All Seats of Judgment, book 8:* Nor can any other person appoint a tutor on the orders of the governor. 1. If a praetor or provincial governor who is agreed to be in a state of lunacy or madness appoints a tutor, I do not think it valid; for although he is praetor or governor and the lunacy does not deprive him of his magistracy, yet the appointment will be invalid. 2. A tutor can be appointed on any and every day. 3. A tutor or curator can be appointed by the praetor or governor to a lunatic of either sex, a dumb man, and a deaf man.

9 MARCIAN, *Institutes, book 9:* Permission is given, according to circumstances, for a tutor to be appointed to an *impubes* in order to accept an inheritance.

10 MARCIAN, *Rules, book 5:* If a tutor is requested for someone who already has a tutor and in the latter's absence he is appointed as though the person had no tutor, the appointment is null and void. For however it happens, if in the request for a tutor a mistake was made in relation to what was done, especially since the *constitutio* of the deified brothers, the appointment of the tutor is not valid.

11 CELSUS, *Digest, book 11:* A curator is not appointed for a *pupillus* or *pupilla* if their tutor is absent.

12 ULPIAN, *Duties of Proconsul, book 3:* The proconsul ought to appoint a curator for those who are in the position of being unable to live within their means. 1. Nor will he hesitate even to appoint a son as curator to his father; for although the contrary view was held by Celsus and many others on the grounds that it was unbecoming for a father to be ruled by his son, yet the deified Pius issued a rescript to Instius Celer, and the deified brothers also issued a rescript, to the effect that a son, if he led a sober life, should be appointed as curator to his father, rather than a stranger. 2. The deified Pius also allowed a mother's complaint about her spendthrift sons, that they should accept a curator in these words: "It is nothing new that some persons, though they seem from their speech to be in full possession of their senses, nevertheless, handle the property belonging to them in such a way that unless help is given to them, they are reduced to poverty. Therefore, someone must be chosen to guide them by his advice; for it is right that we should take forethought also for those who, insofar as concerns their own property, bring things to a ruinous conclusion."

13 PAPINIAN, *Questions, book 11:* If an *impubes* is given his freedom and an inheritance by *fideicommissum* and the instituted heir is unwilling to accept, the senate voted that he should be compelled to accept if desired to do so in the name of the *impubes*, but that a tutor should be appointed to the *pupillus* or *pupilla* by one who has the right of appointment, to retain the tutelage until the inheritance is restored and security given by the heir that the property will be safe. Afterward the deified Hadrian issued a rescript that the same rule should be observed in the case of a man to whom simple freedom had been granted. 1. Although a *cautio* that the property will be safe for the *pupillus* cannot easily be required of a patron, yet the senate wished a man to be treated like a stranger if he also deprived an *impubes* of his freedom, where it rested with him. In fact, he did not lose the rights over the freedman, which he has because he manumitted him by reason of a *fideicommissum*, but the tutelage is not entrusted to him without the restriction of a *cautio*. But what if he does not give a *cautio*? Without doubt the tutelage will not be in the patron's hands. 2. If a girl reaches twelve years of age, he will cease to be tutor; but since it is the custom to appoint curators to *minores* who desire them, if the patron is requested as curator, his good faith shown by an inquiry will be equivalent to the restriction of a *cautio*.

14 PAPINIAN, *Questions, book 12:* A freedman is not obliged to be tutor to any children of his patron or patroness except those who can expect the rights of a patron.

15 PAUL, *Edict, book 2:* A curator for all business ought to be appointed in the place of a tutor who is absent on public affairs.

16 PAUL, *Edict, book 73:* And the latter does not cease to be tutor. This is also the law in the case of all who are temporarily excused.

17 ULPIAN, *Edict, book 9:* Pomponius writes that a tutor can be appointed for a man who is involved in litigation about his own civil status, and it is true, except that the appointment would only hold good if he is free.

18 ULPIAN, *Edict, book 61:* In the appointment of a tutor after inquiry, an inquiry should be made even in the case of someone who is a senator, and Severus issued a rescript to that effect.

19 PAUL, *Plautius, book 16:* When those who have the power to appoint tutors are absent, the decurions are ordered to appoint tutors, as long as the majority are in agreement. In that case, there is no doubt that they have the power to appoint one of themselves. 1. That a municipal magistrate has the power to appoint his colleague as tutor is not in doubt.

20 MODESTINUS, *Distinctions, book 7:* A tutor cannot be appointed by the magistrates of the Roman people for an unborn child, but a curator can; for this is included in the edict on the appointment of a curator. 1. The rule of the law does not prevent another curator from being appointed to a person who already has a curator.

21 MODESTINUS, *Exemptions, book 1:* The magistrates ought to know that women cannot be appointed curators to *minores*. 1. If a mother appoints her sons as heirs on condition that they should be freed from their father's power, when they have been

freed and thus received their inheritance, the father cannot himself be appointed curator, even if he wishes it, lest that which the testatrix did not want should come about in another way. This was so decreed by the deified Severus. 2. But if anyone is prohibited from being tutor by a parent, it is not proper to appoint him; and even if, on being appointed, he does not ask for exemption, he is prevented from being tutor without damage to his reputation. 3. The magistrates should not appoint as tutors or curators those who are on an embassy since, as long as they serve as ambassadors, they do not incur any risk. 4. If the magistrate at Rome appoints as tutor a man from the provinces who is on an embassy, he will be exempt. 5. Besides other considerations, the magistrate ought to look also at the character of those about to be appointed; for neither wealth nor rank indicates trustworthiness as sufficiently as good principles and honest character. 6. Therefore, the magistrates should take the greatest possible care that they do not appoint those who wish to thrust themselves forward in order to be appointed and who give money for it; for it is decreed that such men are liable to punishment.

22 MODESTINUS, *Exemptions, book 5:* Even those who are not decurions can be appointed tutors to the children of decurions, just as decurions can be appointed to the children of those who are not decurions.

23 MODESTINUS, *Encyclopaedia, book 4:* Several tutors can be appointed at the same time.

24 PAUL, *Replies, book 9:* "The deified Marcus and the deified Verus to Cornelius Proculus. If at any time there cease to be in the city from which the *pupilli* originate any persons who seem suitable to be tutors, it is the duty of the magistrates to make inquiries about the most reputable person in the neighboring cities and to send the names to the governor of the province, not to arrogate to themselves the authority of appointment."

25 PAUL, *Replies, book 10:* I replied that a curator appointed to an *impubes* for any reason whatsoever continued in the same curatorship up to the date of puberty; therefore, after puberty the boy ought to request another curator for himself.

26 SCAEVOLA, *Replies, book 2:* When Seia has passed twelve years of age, by a decree of the praetor after an inquiry, a tutor was appointed for her as to a *minor.* I ask whether he ought to claim exemption. I replied that according to what has been put forward no exemption is necessary, nor is he liable because he did not undertake the tutelage.

27 HERMOGENIAN, *Epitome of Law, book 2:* When a *pupillus* has as much wealth in Rome as in the provinces, the praetor can appoint a tutor for the property in Rome, and the governors for the property in the provinces. 1. Freedmen should be appointed as tutors to the son of a freedman; but if a freeborn man is appointed and does not claim exemption, he will continue as tutor.

28 PAUL, *Decrees, book 2:* Romanius Appulus appealed from a judge, saying that he ought not to have been appointed as a colleague in tutelage of a man whom he himself, when he was magistrate, had nominated at his own risk, lest in one tutelage he should bear a double risk. The emperor decreed that a man could be a guarantor on a tutor's behalf and nonetheless be appointed tutor; therefore, he was retained in the tutelage.

29 PAUL, *Judicial Examinations, sole book:* If persons who carry out their business abroad are appointed as tutors or curators, the deified Marcus issued a rescript that the magistrates should inform them within thirty days.

6

THOSE WHO REQUEST TUTORS AND WHEN THEY ARE TO BE REQUESTED

1 MODESTINUS, *Distinctions, book 7:* A mother's anxiety in requesting tutors for her son is not also respected when curators are requested, unless by chance a curator must be requested for an *impubes.*

2 MODESTINUS, *Exemptions, book 1:* If *minores* have no statutory guardians and if they need tutors on account of their age, their cognates and relatives by marriage on both sides of the family can ask for tutors to be appointed to them. Friends of the parents and the children's own foster parents can also ask this. 1. Although the rest request tutors from choice, there are those, on the other hand, who are obliged to request tutors, such as a mother and freedmen; for of these the former are fined and the latter are even punished if they do not request lawful guardians. For the mother is barred from the *legitima hereditas* of her son as being unworthy to receive her lawful share because she did not take thought to have a tutor appointed to him. And it is not only if she does not request a tutor but also, for example, if she requests a man who is entitled to exemption, and then, when he has been exempted or even rejected, she does not again request another or deliberately requests persons of bad character. Freedmen, however, who are arraigned on such charges, are severely punished by the governor if they are shown to have failed to request tutors either through negligence or through bad intent. 2. What has been said about the mother is set out in a letter of Severus, the words of which are given below: "The deified Severus to Cuspius Rufinus. I wish it to be clear to everyone that I take all possible care to help *pupilli*, since this is a matter of public concern. And, therefore, any mother who does not request suitable tutors for her sons or who does not without delay put forward the names of others when the previous tutors have been exempted or rejected, will have no right of *vindicatio* over the property of her sons if they die intestate." 3. But if a person is a creditor or legatee or has some other unavoidable conflict with the *pupillus*, he cannot himself request a tutor for the *pupillus*, but he can require those who have the power to make the request to do so, or if they hesitate, then he can approach the governor and ask for this to be done, in order that when a tutor has been lawfully appointed, the conflict with the *pupillus* may be resolved. 4. This concerns tutors; curators are requested by the *minores* themselves, if they are present, in person. If a *minor* is abroad, he makes the request through a procurator. 5. It is asked whether another person has the power to request a curator for a minor, and the excellent Ulpian writes thus, that another person ought not to make the request for him, but that he should do it for himself; and Paul, in the ninth book of his *Replies*, states that where knowledge and consent of a *pupilla* are lacking, it is clearly not lawful for a curator to be requested for her by her tutor and that it is not unreasonable to compel someone who makes such a request to recognize the risk of transactions carried out by the improperly appointed curator; and in another part of the same book, he replies thus: that if the emperor follows a mother's judgment and appoints curators to her daughter, she ought to consider the risk of their administration. 6. Those who are in any way released from tutelage through exemption are not bound to request a tutor for the *pupilli*, as the *constitutio* of Severus and Antoninus states.

3 PAUL, *Replies, book 10:* I replied that it was possible for even the magistrate himself to be appointed curator by decree of the decurions.

4 TRYPHONINUS, *Disputations, book 13:* One must suppose that the *constitutio* also includes a mother who does not demand confirmation by decree of tutors incorrectly appointed by the father, by will or codicil, to sons who are *impuberes*. 1. But if, when several suitable tutors have been appointed, one of them either dies or receives temporary exemption, a mother who does not request another in his place on the grounds that the number of those remaining is sufficient for the administration of the tutelage does indeed come within the letter of the *constitutio* but is absolved from its intention. 2. But if, when the tutor of the *pupillus* has been accused of untrustworthiness, it is decreed that others should be joined with him, the mother ought to request that they should be appointed also, and if she does not, she falls within the intention of the *constitutio*. 3. Such a mother is indeed refused any *vindicatio* over the property of her intestate sons. If, however, a husband leaves his wife a *fideicommissum* from their son for whom she fails to request a tutor, "if he dies without issue," or on this condition, "if he dies intestate," her claim to the *fideicommissum*, which proceeds on another basis, is not lost. 4. A mother who fails to accuse a tutor of untrustworthi-

ness incurs no penalty either by the letter or the intention of the law, since it is for the masculine mind to judge and determine facts of this kind and a mother can be ignorant even of criminal acts; it is sufficient that she should have requested such a person as appeared suitable when an inquiry was held by the praetor. Therefore, her judgment is not sufficient for choosing tutors, and an inquiry should take place, even if she has appointed tutors by will to her children especially for their own property.

7

MANAGEMENT BY TUTORS AND CURATORS AND THEIR LIABILITY, THE QUESTION WHETHER THEY ACT OR NOT, SUITS BY OR AGAINST ONE OR ALL

1 ULPIAN, *Edict, book 35:* A tutor can be compelled *extra ordinem* to undertake and administer a tutelage. 1. Therefore, he knows that when he has been appointed tutor, if he fails to act as tutor, he does so at his own risk; for it was decided in a *constitutio* of the deified Marcus that a man who knows he has been appointed tutor and does not bring forward grounds for exemption, if he has them, within the prescribed time, fails to act as tutor at his own risk. 2. For tutors, it will be enough for a complete defense, whether they themselves undertake a case, or the *pupillus* does so on their authority, nor are tutors compelled to give a *cautio*, as is customary for the defendants. Therefore, they will have freedom of choice, whether they prefer to undertake the case themselves or to employ the *pupillus* to undertake the case on their authority. However, just as tutors may themselves undertake the case on behalf of those who cannot speak or are absent, they may offer their authorization on behalf of those who are over seven years of age and are present. 3. In cases concerning adults also, there will be freedom for the plaintiffs either to summon the adult himself to appear in court, so that he may be sued with his curator's consent or to proceed against the curator, so that he himself undertakes the lawsuit. But when the adults are absent, one must proceed against the curator in every case. 4. Neither tutors nor curators are denied the right to summon to court also debtors of *pupilli* or adults in their own names out of respect for their office or to give their consent to the *pupilli* or adults when they do this.

2 ULPIAN, *Edict, book 9:* If a tutor obtains a condemnation or is himself condemned, an action on a judgment is granted rather to the *pupillus* and against the *pupillus*, especially if the tutor did not expose himself to the litigation, but undertook it because he was unable, either on account of the absence or *infantia* of the *pupillus*, to give him authorization to undertake the case. The deified Pius also issued a rescript to this effect, and since then it has been stated in many rescripts that an action on a judgment should always be granted against the *pupillus* when the tutor is condemned, unless he is excluded; for then it is granted neither against the tutor nor the *pupillus*. Nor it is often said in rescripts, should pledges be taken from the tutor. 1. Further, Marcellus writes in the twenty-first book of his *Digest* that if the tutor gives security and then the *pupillus* abstains, his guarantors should also receive assistance; but even if the *pupillus* does not abstain, the same assistance should be given to his guarantors as to himself, particularly if he gave security on behalf of a *pupillus* who was absent or an *infans*.

3 ULPIAN, *Edict, book 35:* If several curators have been appointed, Pomponius writes in the sixty-eighth book of his *Edict* that even what is done by only one of them ought to be ratified; for in the case of the curators of a lunatic also, so that nothing should stand in the way of the lunatic's advantage, the praetor decrees the curatorship to one of them and will ratify what has been done by him without fraudulent intent. 1. If a parent or father who has children in power has designated in his will which of the tutors should manage the tutelage, the praetor thought that that man ought to manage it, and it is right to abide by the wish of a parent who undoubtedly took such proper forethought for his son. The praetor also does as much for those whom a parent has designated by will and himself confirms that if a parent has declared whom he wishes to administer the tutelage, that man should be sole administrator. 2. Therefore, the remaining tutors will not be administrators, but will be what we commonly call honorary tutors. But let no one think that no risk will spill over on to them; for it is certain that they also ought to be sued, when the means of the person who has managed the tutelage have first been exhausted. For they have been appointed as observers and guardians of his acts, and at some time, they will be asked why, if they saw that he was leading a bad life, they did not accuse him of untrustworthiness. Therefore, they should continually both demand accounts from him and take punctilious care concerning his mode of life, and if there is any money which can be invested, they should take care that it

is invested in the purchase of estates. For those who think that honorary tutors are not held liable in any way delude themselves; for they are held liable in accordance with what we have indicated above. 3. Yet although the praetor says that he will entrust the tutelage for preference to the man to whom the testator assigned it, sometimes, however, he goes back on this, for example, if the father has acted without giving sufficient thought to the matter, perhaps being under twenty-five years of age, or has acted at a time when that particular tutor seemed to live a good or virtuous life, but then afterward began to lead a wicked life, unknown to the testator, or if the property was entrusted to him in consideration of his wealth, of which he was afterward deprived. 4. Also if a father appoints a single tutor, sometimes curators are joined with him; for our emperor and his father issued a rescript that when someone had appointed his two freedmen as tutors, one for the Italian property, one for the African property, curators should be joined with them, and they did not follow the father's wishes. 5. What has been written concerning tutors should also be applied in the case of curators, that those whom a father has designated by will should be confirmed by the praetor. 6. Therefore, it is clear that the praetor should take care that a tutelage is not administered by several persons; for even though the father did not indicate who ought to manage it, yet the praetor deals with the matter so that the administration is carried out by one person; for, of course, a single tutor can more easily both bring and defend actions. 7. So that a tutelage should not be divided among many, if a tutor has not been chosen by the testator or is unwilling to manage it, then the person to whom the majority of the tutors assign the tutelage should be manager. Therefore, the praetor will order them to be summoned together, or, if they do not come or, having assembled, do not make a decision, he should hear the case and himself decide who is to manage the tutelage. 8. Clearly, if the tutors do not agree with the praetor, but all wish to be managers, because they do not trust the man he has chosen and do not wish to be substitutes for the risk to which another is liable, one must say that the praetor should allow them all to manage the tutelage. 9. Again, if the tutors wish the tutelage to be divided among them, their request should be allowed, and the administration distributed between them,

4 ULPIAN, *Edict, book 9:* divided either into shares or areas, and if it is so divided, each one of them will be freed by a defense in relation to that share or area which he does not administer.

5 ULPIAN, *Edict, book 35:* Yet there is occasion for money to be deposited only in order that if such a sum can be gathered together, that is, collected, a field can be bought; for if it can easily be proved that the tutelage is so poor that a farm cannot be bought for the boy with the sum amassed, the depositing of money is useless. Therefore, let us see how large a tutelage should be to introduce the question of depositing money. And since the reason for making the deposit is described as being in order that estates should be bought for the *pupilli*, it is clear that it does not seem to relate to very small sums; in general it is not possible to set a limit to these, since it can be more easily tested by hearing the cases separately. Yet the opportunity should not be removed for even *minores* to request that money should be deposited in the meantime, if their tutors seem to be untrustworthy. 1. A tutor will be held to have managed a tutelage if he touches anything at all which belongs to the *pupillus*, however modest, and the function of those who usually compel inactive tutors to administer the tutelage is not needed. 2. But if, after he has managed the tutelage, he then abstains from its management, a charge of untrustworthiness will also succeed. 3. But if someone has entrusted the management to another and it has been managed by the person to whom it was entrusted, there is scope for an action on tutelage; for a person who has managed a tutelage through the agency of another is held to have managed it himself. But if the man to whom it was entrusted did not undertake it, the tutor can be sued in an *actio utilis*. 4. A father's debtor who administers the son's tutelage is also liable in an action on tutelage on account of his debt to the father. 5. If a tutor does not remind his *pupillus*, when he reaches puberty, to request curators for himself (for a person who administers a tutelage is ordered to do this by sacred *constitutiones*), is he liable in an action on tutelage? I rather think that an action on tutelage is available, since this offense is connected with the office of tutelage, even though it was committed after puberty. 6. After the *pupillus* has reached twenty-five years of age, if accounts have not been rendered nor the documents relating to the case, it is appropriate to the good faith and modesty of the curators that they should, by their advice, bring to a conclusion the lawsuit which as been begun. Therefore, if they fail to perform these appointed duties, I rather think that an action for unauthorized administration suffices, even if an action has already been brought, provided that the accounts in this affair have not already been rendered. 7. Julian, in the twenty-first book of his *Digest*, puts forward a special case of this kind: A certain person on his death appointed tutors for his sons and added: "And I wish them not

to be accountable." Julian says that the tutors, if they do not show good faith in their administration, ought to be condemned, although it was expressed in the will that they should not be accountable; nor on that pretext ought they to obtain anything by way of *fideicommissum*, as Julian says. For no one can dismiss public law by *cautiones* of this sort, nor change the model established in ancient times. However, any loss which a person may suffer as a result of a tutelage can both be bequeathed to him and left to him by *fideicommissum*. 8. Papinian, in the fifth book of his *Replies*, writes thus: A father enjoined that the tutelage of his sons should be managed in accordance with their mother's guidance, and by these words he released the tutors from their obligation. The office of the tutors is not on that account in any way diminished, but it will be proper for a man of good character to accept the mother's guidance as beneficial, notwithstanding that neither the releasing of the tutor from obligation nor the father's wish nor the mother's intervention lessens the tutor's office. 9. Tutors, however, are permitted to ignore a father's command to the extent that if the father has ordered that none of his property is to be sold off or that his purchased slaves are not to be sold nor his clothing nor his house nor any other property which is subject to risk, they are permitted to disregard this wish of the father's. 10. From the time when it becomes known to the tutor that he is tutor, he ought to know that the risk of an action on tutelage is applicable to him. For it to become known in any way at all is sufficient, certainly without his being summoned before witnesses; for even without testimony from whatever source he learns it, there is no doubt that he ought to consider the risk as pertaining to him.

6 ULPIAN, *Edict, book 36:* The *pupillus*, however, will be obliged to prove the fact that the tutor knew.

7 ULPIAN, *Edict, book 35:* A tutor who does not make a catalog, which is commonly called an inventory, is held to have acted fraudulently, unless perhaps some necessary and lawful reason can be alleged, why this was not done. Therefore, if it is through fraud that a person does not make an inventory, he is in the position of being liable for the amount which concerns the *pupillus*, which is estimated by an oath as to value in issue. Therefore, he ought to undertake nothing before an inventory is made, except something which cannot wait even for a moderate delay. 1. If a tutor fails to sell off perishable items, he creates his own risk; for he ought to have discharged his duty immediately. If he was waiting for his fellow tutors who were causing delay or even wishing to be exempt, should he be pardoned? He cannot easily be pardoned; for he ought to have performed his part, not indeed with precipitate haste, but without dilatory hesitation. 2. An action on tutelage against the tutors will be appropriate, if they have made a bad contract, that is, if through meanness or favor they have purchased estates which are unsuitable. Then, what if, acting neither meanly nor out of favor, they have still picked a bad bargain? Anyone is right in saying that they ought in this case to answer to a charge of negligence alone. 3. If, after money has been deposited, the tutors have neglected to purchase estates, they will be liable to be sued for the interest. For although they ought to be compelled by the praetor to make a purchase, yet if they fail to do so, they should also be punished by paying interest because of their slowness, except where it was not by their fault that something happened to prevent the purchase. 4. Tutors pay statutory interest on money which they have diverted for their own use, but this is only so if they are clearly shown to have diverted the money for their own use; but someone who has not lent it at interest, or has not deposited it, has certainly not turned the money to his own use, and so the deified Severus decreed. Therefore, he must be shown to have turned the money to his own use. 5. We do not accept that a man who was the debtor of the father of a *pupillus* and then does not himself pay off the debt has turned the money to his own use; for he will pay the interest which he had promised to the father. 6. If a tutor lends at interest in his own name money belonging to the *pupillus*, he will only be compelled to pay the interest which he received if the *pupillus* takes upon himself the risk of the other loans. 7. If it is necessary for money to be deposited for the purchase of estates, if this is in fact done, interest will not be incurred; but if indeed it is not done, if no order has even been given that it should be deposited, the interest due to the *pupillus* will be paid; but if an order has been made and ignored, one must look into the amount of the interest. The praetors usually threaten that if no deposit is made or if it is made too late, statutory interest should be paid; therefore, if the threat is interposed, the judge who at some time hears the case will follow the praetor's decree. 8. The praetors usually act in the same way also concerning those tutors who deny that they have anything in their posses-

sion for the maintenance of their *pupilli*, so that a very heavy interest is paid on whatever is shown to be in their possession; and it is clear that a judge ought to follow this with some additional penalty also. 9. Interest due to the *pupillus* ought also to be paid on the balance outstanding. 10. One must look into the question of what the interest due to the *pupillus* is. And it is clear that the payment of interest takes this form, so that a man pays the statutory interest on that money which he, in fact, has diverted for his own use. Also if he denies that he has the money and the praetor decides against him, he will have to pay the statutory interest, or if he causes a delay in depositing the money, the praetor also imposes the statutory interest on him. Also if, while he denies that he has a certain amount in his possession, he imposes upon his *pupilli* the need to borrow money at statutory interest in order to settle their expenses, he will be liable for statutory interest. It is the same if he exacts statutory interest from debtors. In appropriate cases he will pay, according to the custom of the province, interest of five percent or four percent or any other lesser rates which are frequently used in the province. 11. Interest is not demanded immediately from tutors, but after an intervening period of two months for the demand and collection of the sum, and this is generally observed in an action on tutelage. This space or indulgence in time ought not to be granted to those who have diverted the money of *impuberes* or *adulescentes* to their own use. 12. If a tutor or curator keeps for his own use interest which has been paid, they ought to recognize their responsibility for the interest on this; for surely it matters little whether it is the capital belonging to the *pupillus* or the interest on it which they have diverted to their own use. 13. The heirs of a curator will also pay interest on money which is in the strongbox for as long as they fail to request that a curator should be appointed in the dead man's place. 14. If a tutor is condemned on account of a fellow tutor, it is asked whether he should also be condemned to pay interest. And it seems right, as is stated in many rescripts, and as Papinian says in the twelfth book of his *Questions*, that he should also be condemned to pay the interest, if he refrained from accusing him of untrustworthiness; and he ought certainly to be compelled to pay exactly the same interest as he is compelled to pay on his own administration. 15. It should be known that a tutor, even after the termination of his office, is bound to pay interest up to the day on which he resigned the tutelage.

8 ULPIAN, *Edict, book 23:* If the person whose tutelage has been administered brings an action on tutelage, it must be said that sometimes one must wait for the date on which a loan is due, if a tutor has perhaps lent money in the name of the *pupillus*, and the date for the repayment of this money has not yet arrived. Certainly, as far as the money is concerned, this is only true if the tutor both could and should have made the loan; but if he ought not to make a loan, one will not wait for the due date.

9 ULPIAN, *Edict, book 36:* Whenever a tutor lends at interest money belonging to the *pupillus*, a stipulation to this effect must be made. For the *pupillus*, or the slave of the *pupillus*, ought to take a stipulation; but if the *pupillus* is not of an age to be able to take a stipulation and has no slave, then the tutor himself, or one who is in his power, should do so in which case Julian frequently wrote that an *actio utilis* should be granted to the *pupillus*. But if the pupillus is absent, there can be no doubt that the tutor ought to take a stipulation in his own name. 1. If a head of a household appoints as tutor to his son a man on whose behalf he gave a verbal guarantee, it is appropriate to the tutor's duty that when the day for paying the money has passed, he should pay off the debt to the creditor; and therefore, should he fail to do so, if the *pupillus* who is subject to his tutelage pays the debt as a result of the verbal guarantee, he will be able to bring an action not only on mandate but also on tutelage; for the tutor will be asked why he did not pay the debt on his own behalf. But if the tutor was a debtor until a certain date, some think he does not come within the action on tutelage, as long as that date comes after the termination of the tutelage; but if the date comes within the duration of the tutelage, they consider he falls completely within the action on tutelage. I consider both this and the former view to be true to the extent that the tutor has begun to lose his property; but if the tutor is solvent, nothing comes within the action on tutelage. Let no one think this view has no effect; for if someone says that the tutor falls within the action on tutelage, then this means both that the *pupillus* is in a privileged position and that the guarantors are liable if there was a *cautio* that the property would be safe. 2. Again, if the tutor was bound by a temporary action, it must be said that there is scope for an action on tutelage, so that the action may be perpetual. 3. And in general he ought to offer his *pupillus* the same guarantee against himself as he offers him in the case of another person, perhaps even more; for he cannot proceed against others without an

action, but against himself he can. 4. Also if he owes money to the father of the *pupillus* at a higher rate of interest than the rate paid to the *pupillus*, it must be seen whether any charge can be laid against him. And if he pays it off, there is nothing with which he can be charged; for he can pay and not burden himself with the interest. But if he does not pay, he must be compelled to acknowledge the interest which he must exact from himself. 5. But just as a tutor can pay what he owes, so he can also exact what is owing to him, if he is a creditor of the father of the *pupillus*; for he can also repay himself, as long as there is money from which he can make the payment, and if the interest which was owing to him was higher, the *pupillus* will be relieved of it, because the tutor can release himself, just as he both can and should pay debts to others also. 6. Nor does he have any need, if he is sued, to make the payment through a judge, and therefore, if the case of the *pupillus* is bad, he ought to give notice of the truth for himself. Finally, the Emperor Antoninus and his father also forbade them to charge the *pupillus* with the fees, if they had instituted an unnecessary lawsuit when they were sued by a genuine creditor; tutors, however, are not forbidden to claim good faith. 7. A tutor is able not only to pay off a debt to himself but also to give a note for money lent to himself, as Marcellus wrote in the eighth book of his *Digest*, and he is able to make himself liable for the borrowed money by putting the loan to himself in writing. 8. It is clear that it is not the custom for a man who has been appointed in respect of an addition to the tutelage, as, for example, in respect of maternal property which has been added afterward or of some other addition to administer the original property. If, however, he fails to accuse the former tutor of untrustworthiness or to demand security from him, he will be punished. 9. On the other hand, a man who is simply appointed tutor or curator to a *pupillus* will be liable for the risk if any addition afterward accrues, although it is usual for a curator to be appointed in respect of the addition. This circumstance does not mean that the actual additions do not belong in the care of the former curators to whom all that is of benefit to the *pupilli* ought to belong. Therefore, if a curator is appointed, the risk will be shared with the previous tutors, but if a curator is not appointed, the one who was appointed beforehand will be subject to the necessity of administering the additions to the tutelage.

10 ULPIAN, *Edict, book 49:* In general, whenever a tutor fails to do in the name of the *pupillus* what any solvent head of a household does, there is understood to be no defense; therefore, if he refuses payment or a judgment or a stipulation, there is understood to be no defense.

11 ULPIAN, *Edict, book 33:* Concerning the *pupillus* for whom a slave was appointed as tutor, the deified Pius issued a rescript that the master could not make use of his privilege of deduction in respect of those properties which the slave had purchased out of the money of the *pupillus*. This rule should also be followed in the case of a curator.

12 PAUL, *Edict, book 38:* When several persons manage a tutelage, none of them is granted an action in the name of the *pupillus* against a fellow tutor. 1. What is done in good faith by a tutor is ratified in accordance with the rescripts of Trajan and Hadrian; and therefore, a *pupillus* cannot vindicate property lawfully sold off by a tutor; for it is also injurious to *pupilli* if their administration is not upheld, when surely no one would buy. Nor does it matter whether the tutor was solvent or not, since, if the business was carried out in good faith, it should be upheld, if fraudulently, the alienation is not valid. 2. It is too much to allow a tutor, out of regard for the good name of the *pupillus*, to expend from his property what he would not honorably have expended from his own. 3. Since a tutor is put in charge not simply of the property but also of the well-being of the *pupillus*, in the first place, he will decide on the wages of the teachers, not the lowest he can, but those in accordance with the resources of the inheritance and in accordance with the rank of the family, he will provide maintenance for the slaves and freedmen, sometimes even for those outside the household if this will be advantageous to the *pupillus*, and he will send the customary gifts to parents and relatives. He, however, will not give a dowry to a sister born of a different father, even if she cannot otherwise marry; for although it is an honorable act, yet it arises out of generosity, the practice of which is at the discretion of the *pupillus*. 4. If a tutor cannot lend money belonging to the *pupillus* because there is no one to whom he can lend it, he will be free from obligation to the *pupillus*.

13 GAIUS, *Provincial Edict, book 12:* A tutor ought to consider the rank and wealth of the *pupillus* in estimating the number of slaves who are to be in attendance. 1. No hearing should be given to a tutor when he says that the money belonging to the *pupillus* is lying idle just because he has not found suitable loans, if it is proved that at that time he has invested his own money well. 2. In paying out legacies and *fideicommissa*, the tutor ought to pay attention that he does not pay anyone what is not owing, nor should he send a wedding present to the mother or sister of the *pupillus*. It is another matter if the tutor provides the mother, perhaps, or the sister

of the *pupillus* with the things which are necessary for her subsistence, when she is unable to support herself; for that ought to be approved, as there is not the same reason for the expense incurred in this matter and for payment made under the title of a present or legacies.

14 PAUL, *Notes, book 8:* An act of a fellow tutor can also be reckoned against his colleague, if the latter could and should have accused him of untrustworthiness, sometimes also if he should have demanded security; but if a solvent tutor suddenly loses his property, no charge can be made against his colleague.

15 PAUL, *Views, book 2:* If a tutor on his appointment does not sue those whom he discovers to be debtors and through this they become less able to pay or if he does not invest the monies belonging to the *pupillus* within the first six months, he himself can be sued for the money owing and for the interest on the money which he has not loaned out.

16 PAUL, *Sabinus, book 6:* When it is asked in the action on tutelage what loans made by the tutor the *pupillus* ought to acknowledge, Marcellus thinks that if the tutor has given the money of the *pupillus* on loan and taken a stipulation in his own name, then it can be said that the sound debts are retained intact for the *pupillus* and those that are bad debts and ill-advised are the responsibility of the tutor. But he does better when he thinks that the tutor can impose this condition on the *adulescens*, that he should either totally acknowledge or totally repudiate what the tutor has done in arranging loans, so that it would be exactly as if the tutor had undertaken the business for himself. It is the same also if the tutor has lent money in the name of the *pupillus*.

17 POMPONIUS, *Sabinus, book 17:* Someone who was ordered by a person who has the right to give the order to manage a tutelage, if he had failed to do so, will have to show that the *pupillus* was unharmed from the time at which the order was given, not from the time at which he began to be tutor.

18 JULIAN, *Digest, book 21:* There ought to be no doubt that a person who has managed the business of a *pupillus*, even though he has not given his authorization to the *pupillus* in any matter, is liable in an action on tutelage; for what is to prevent the inheritance of the *pupillus* being composed in such a way that it is not necessary to undertake any business for which the tutor's authorization needs to be given? 1. When there are two tutors, if there has been an action against one, the other will not be exempt.

19 ULPIAN, *Replies, book 1:* A curator cannot be compelled to give an account of his management to a fellow curator, but if he does not share the administration with him or if he does not manage the curatorship in good faith, he can be charged with untrustworthiness.

20 ULPIAN, *Duties of Proconsul, book 5:* A tutor or curator whose appeal is declared to be unlawful or whose claim for exemption is not allowed will be liable from the time at which he ought to have entered upon the administration.

21 MARCELLUS, *Replies, sole book:* Lucius Titius appointed Gaius Seius, himself a son-in-power, by will as tutor to his son; Gaius Seius, with the knowledge and consent of his father, administered the tutelage. I ask whether, on the death of Gaius Seius, an action on tutelage against his father will be appropriate and to what extent. Marcellus replies that according to what has been put forward, the father will be liable in an action on the *peculium* and benefit taken. Nor, in this case, does it seem that the father's knowledge and consent are of much use in making him liable for the whole sum, unless perhaps he intervened when a fellow tutor or some other person wanted to accuse his son of untrustworthiness and, as it were, took the risk upon himself.

22 PAUL, *Edict, book 3:* A tutor can both renew debts and bring a matter to judgment for the benefit of the *pupillus*; but gifts made by him do not harm the *pupillus*.

23 ULPIAN, *Edict, book 9:* It is generally accepted that a tutor need not guarantee that the *pupillus* will ratify a matter, because he has brought the matter to judgment. For what if there is some doubt whether he is tutor or whether he continues to be tutor or whether the management was entrusted to him? It is right that the opponent should not be deceived. It is the same in the case of a curator, as Julian writes.

24 PAUL, *Edict, book 9:* By the praetor's decree it is customary for an agent to be appointed at the tutor's risk, whenever either the business is extensive or the rank or

age or ill-health of the tutor require it. If, however, the *pupillus* is not yet able to speak so as to be able to instate a procurator, then an agent must be appointed out of necessity. 1. If the management of a tutelage is entrusted to two persons at the same time either by a parent or by the fellow tutors or by the magistrate, it must be readily accepted that the agency was entrusted rather to one person, since two persons cannot act as agents at the same time.

25 ULPIAN, *Edict, book 13:* Suppose that there had been an action between a *minor* and his tutors with curators to assist the *minor*; and then the *pupillus*, on account of this, sued the curators, and they were condemned in respect of their responsibility for the tutors of the *minor* not having been condemned because of their negligence, would a claim for restitution against the tutors be invalid? Papinian says in the second book of his *Replies* that it is nevertheless possible for restitution to be made, and for that reason, the curators, if they have not already brought the matter to judgment, can appeal on a defense of fraud and ensure that they are granted actions against the tutors. What, however, if the curators have already brought the matter to judgment? This will benefit the tutors, since the *minor*, who is more concerned with profit than loss, has lost nothing, unless perhaps he is ready to assign actions to the curators.

26 PAUL, *Edict, book 24:* An action can be brought against a curator and an unauthorized tutor while their administration continues.

27 PAUL, *Plautius, book 7:* A tutor who manages a tutelage ought to be regarded in the position of an owner to the extent that he acts out of forethought for the *pupillus*.

28 MARCELLUS, *Digest, book 8:* A tutor summoned to judgment on behalf of a *pupillus* gave a guarantee in the customary way; if, in the meantime, the boy has reached puberty, he cannot be compelled to accept the judgment. 1. A tutor who, after the *pupillus* reached puberty, ceased to manage his affairs does not have to pay interest from the time at which he offered the money; and indeed it seems to me even fairer that he should not be compelled to pay interest when it was not owing to him that he was sued and resigned the tutelage. ULPIAN notes: It is not sufficient for him to have offered the money, unless he also deposited it under seal in a safe place,

29 MARCELLUS, *Digest, book 8:* especially where the tutor's heir is concerned. For it is most unjust that a man who, after perhaps twenty-five years or more, has had the notion to sue again on tutelage, should also require interest.

30 MARCELLUS, *Digest, book 21:* A tutor's principal duty is that he should not leave the *pupillus* unprotected.

31 MODESTINUS, *Exemptions, book 1:* "The deified Emperors Severus and Antoninus to Sergius Julianus. The rule by which individual tutors just as each has exercised the tutelage are sometimes liable for the whole sum, applies only up to the time of puberty, not if they retain the administration after puberty.

32 MODESTINUS, *Replies, book 6:* A tutor dies without an heir; I ask whether a curator appointed to the *pupillus*, when no inventories or other documents are produced by the tutor's guarantor, can sue that same guarantor on the stipulation for the amount which concerns the *pupillus*. Modestinus replied that the guarantor also can be sued for the amount for which the tutor can be sued. 1. Modestinus replied that if any loss occurred because the guarantees for the payment of tax were not found, it is in no way the responsibility of the tutor, who is not represented as having acted negligently. 2. Modestinus replied that a tutor ought to render an account to the *pupilla* listing those revenues which can be collected in good faith from the estate. 3. He also replied that if a tutor collects less from a slave than can in good faith be collected from the estate, then this same tutor ought to have the benefit of as much of the amount for which he is liable to the *pupilla* as can be saved from the *peculium* of the slave, if, that is, he has entrusted the administration to a slave who will not ruin it. 4. By the intervention of his curator, an *adulescens* sold a farm to Titius; afterward fraud was recognized, he was granted *restitutio in integrum* and ordered to take possession. I ask whether, although he has not become better off as a result of this sale nor can it be proved that he has made a profit, he ought not to return the price to the purchaser. Modestinus replied that it is useless for the purchaser to demand the price of the farm sold by the *adulescens*, if there was no benefit to his affairs and no decision was given

on the matter by the judge granting the *restitutio in integrum.* 5. He also replied that expenditure made for pleasure's sake by the buyer should not be a burden to the *adulescens*; yet the buyer ought to be permitted to remove such things as can be removed from the building so as to leave it in its former state, that is as it was before the sale. 6. Lucius Titius was his sister's co-heir and curator and came from a city in which it was customary for the owners of the estates themselves, not the tenants, to be responsible for the grain ration and the seasonal distributions; he followed this custom and long-established practice, and himself took charge of the grain ration for the joint and the individual inheritance. I ask whether the curator can be opposed in rendering the accounts, because he did not fairly make such payments as were in accordance with his sister's share. Modestinus replied that the curator of an adult woman can charge in the case about which the question is asked only up to the amount she herself, if she were administering her own property, would be compelled to pay out. 7. Two tutors, after the sale on bankruptcy of property belonging to the *pupillus*, divided the money obtained between themselves; after this division one of them was sent into exile while the tutelage lasted. It was asked whether, on the appointment of an agent, his fellow tutor could demand from him his share of the pupillary money. Modestinus replied: If this is the question, whether when one tutor is banished his fellow tutor can effect an action on tutelage, I said he could not.

33 CALLISTRATUS, *Judicial Examinations, book 4:* Tutors and curators of *pupilli* are required to show the same care over the administration of the pupillary property as the head of a household ought in good faith to display for his own property. 1. The duty of the tutors comes to an end with the appointment of curators, and, therefore, all business which has been begun passes into the protection of the curators. The deified Marcus and his son Commodus also issued a rescript to this effect. 2. The heirs of the *pupilli* are also allowed the same choice, that of deciding against which of the tutors they wish to make an accusation, as those whose tutelage has been administered; this is decreed by imperial *constitutiones.* 3. It is usual to draw up an account of expenses which are incurred in good faith for the benefit of the tutelage, not that of the tutors themselves, unless the person who appointed the tutor decided upon a certain compensation for him.

34 JULIUS AQUILA, *Book of Replies:* He replied that, to provide information for the judge and to bring benefit to the *pupilli*, their slaves also can be interrogated.

35 PAPINIAN, *Questions, book 2:* A tutor or curator is indeed compelled to take over from a former tutor or curator debts which he rightly thinks are not sound, but not to call them in at his own risk.

36 PAPINIAN, *Questions, book 3:* A tutelage was shared between tutors. Equity, which establishes the true just measure, does not vary according to the office and character of the acting tutor; for the division of a tutelage, which is not a matter of law but of magisterial discretion, creates a means of administration and takes place between the tutors themselves; nor should it be an obstacle to those who wish to go to law with the *pupillus.*

37 PAPINIAN, *Questions, book 11:* Sabinus and Cassius thought that a tutor who manages a tutelage, while he manages, can be liable at times on several grounds in each case. 1. In accordance with this opinion, if a slave who is agent for the sale of his master's goods or overseer for the collection of debts is freed and continues in the same employment, although he could not be held liable during the time of his servitude, it is by no means useless to sue him in an action for unauthorized administration with reference to the previous period of time, provided that it concerns matters which have a connecting relationship with later acts; and so it seemed right that an action on tutelage should apply also in respect of those matters which form part of the administration after puberty, if the later administration is closely connected with the earlier and is not divided so as to have its own separate accounts. 2. From this arises the question which is commonly asked concerning a son in power who has been appointed as tutor by will and emancipated after undertaking the management of the tutelage and continued in the same office. In accordance with the opinion of Sabinus and Cassius, it turns out that he, indeed, can be sued for the whole sum in respect of what was

done after his emancipation, but in respect of the previous period, whether the *peculium* has been exhausted or not, he can be sued for what he is able to pay. But if, with reference to the earlier period, the *pupillus* prefers to sue the father for the *peculium* (for the year allowed for bringing an action will be reckoned from the time at which it became possible to bring an action on tutelage), so that the father should not be subjected to a case brought covering the entire period of time, the time with which the action is concerned is to be understood as that during which he managed the tutelage as a son-in-power.

38 PAPINIAN, *Questions, book 12:* If several persons have failed to administer a tutelage and all are solvent, since no divisions of the administration can be discovered, is there any scope for a choice of defendant, or ought they, as debtors for the same sum of money, to accept the risk jointly? Reason urges the latter view more strongly. 1. If certain of them are not able to pay, without doubt the rest will bear the burden, not unfairly, since the obstinacy of individuals has inflicted upon the *pupillus* a loss as regards the whole sum. 2. Following from this, it must be asked whether the *pupillus* ought to offer to the one who is sued alone actions against the other tutor in respect of his share. But as long as each person's own obstinacy is punished, on what pretext can this be desired?

39 PAPINIAN, *Replies, book 5:* Tutors who remained after the termination of a tutelage because of a mistake about their office and have retained the administration of affairs cannot be compelled to be responsible for the risk of paternal loans which were sound after the *adulescens* reached puberty, since they had no power to bring an action. 1. A curator, appointed by a father in his will, by mistake involves himself in the affairs of an *impubes*; when other tutors have been appointed later by the praetor, the curator, if he has done nothing afterward, will not be responsible for risk incurred at a future time. 2. When a person who has been unlawfully appointed as tutor in accordance with the father's wish involves himself in the affairs of an *impubes*, upon discovering the mistake, it is better for him to ask to be appointed tutor by the praetor to prevent his being condemned for fraud or neglect if he abandons any business he has begun. The same rule does not apply if a man voluntarily undertakes another's business matter, since the interests of the owner are more than sufficiently met in the one particular through the efforts of a friend. 3. An instituted heir, who has no substitute heir, dies before he can accept the inheritance which he ought to have restored to an *impubes*; since the inheritance is in Italy but the appointed heir died in one of the provinces, I think that the tutors for the provincial property ought to be condemned on a charge of negligence if, not being ignorant of the provision of the will, they relinquish the benefit to the *impubes*. For, on the one hand, the case of the inheritance could have been settled in the province by the restoration of the *fideicommissum*, and, on the other hand, the administration of the property ought to have returned to those who undertook the tutelage in Italy. 4. If a tutor keeps a *pupillus* from his father's inheritance, an action against the tutor should not be denied to a creditor who has made a contract with the tutor himself, even though the tutor has made a profit for the *impubes*. 5. The curators of an *adulescens* offered a *cautio* to each other in respect of a mutual risk and gave pledges for that purpose; since they were solvent on resigning their post, it was apparent that the *cautio* was void and the bond of the pledge was released. 6. An appointed tutor appealed against the actual appointment; his heir afterward lost the case and will be responsible for the risk incurred during the intervening period, since it is not regarded as a slight offense to refuse an appointment to the office of tutor contrary to the authority of the law. 7. Tutors for provincial properties who are bringing cases on appeal at Rome for *impuberes*, provided that curators for the Italian property are appointed for the *impuberes*, ought to resume their post; otherwise, if they return to the province prematurely, the judge will rightly summon them for fraud or negligence on that account also. 8. An uncle was appointed by will as tutor to his brother's son and, although he was domiciled in Italy, he undertook the administration both of the Italian and the provincial property, and so he transferred money made on sales at Rome to the province and recorded the transfer in the account book of the *pupillus*. A substitute tutor in his place at Rome is not compelled to undertake the administration of money which does not belong to his tutelage. 9. Testamentary curators or tutors ineffectively appointed and not confirmed by the praetor transacted business. They are compelled to bear the risk mutually, since they have entered upon their office of their own accord without the support of the law, and one who is solvent ought to appeal for a decree from the praetor who appoints curators or tutors. 10. When solvent tutors die, the risk mutually does not spill over on to their heirs, since it had no place for the duration of the office of tutelage.

11. It seems right that an *actio utilis* on tutelage should be granted against someone who refused to manage a tutelage, after an action has been granted against the rest who did manage it. Inasmuch as the action on tutelage, however, does not concern those who have voluntarily involved themselves in affairs, but relates to joint negligence, it equally concerns the risk of all apart from the case of a substitution. 12. The tutors of a *pupillus* who has been declared *pubes* completed an unfinished suit of appeal by order of the consuls because of their acquaintance with the case; although they were unable to obtain judgment they are not subject to the risk of a charge of negligence. 13. Someone who gets no assistance from the remedy of restitution can surrender, with the agreement of the tutors, the right to proceedings for negligence, and this is seen not as a gift but as a settlement. 14. When the risk of loans which the father made at higher interest is ascribed to the negligence of the tutors, the *pupilla* is indeed compelled to offer the action on the account books, but keeps the interest paid during the time of the tutelage apart from any set-off. 15. An *adulescens*, after suing his tutors and being unable to get back all his property intact, retains undiminished his right of action against the curators who, by their negligence, failed to transfer the tutelage to themselves; for it does not seem to be consumed in the judgment on tutelage, because he has a complaint in respect of the other office. 16. A tutor who was unwilling to sue the solvent heir of a tutor on behalf of the *pupillus* becomes liable for the loss, like the tutor who failed to accuse of untrustworthiness a tutor who was not solvent at the time of the tutelage. 17. An action on tutelage ought not to be deferred on the grounds that the same person undertakes the tutelage of a brother and co-heir who is *impubes*. 18. How much an *adulescens* retains or may retain from the *peculium* of a slave acting as agent, whom he manumitted after the latter had begun to administer his affairs, will be accredited by the judge to the curator in the rendering of accounts.

40 PAPINIAN, *Replies, book 6:* A centurion appointed a curator to his son who is *impubes*. As the praetor's decree was not followed, if the appointed curator does not act as administrator, he will not be bound by the risk of a charge of obstinate refusal or negligence; for the privilege of soldiers ought not to be extended to cause damage to others, nor is indulgence for ignorance concerning a last will granted for anything other than the property of soldiers; the tutelage of a son, on the other hand, is assigned by the law of parental power, not by military prerogative.

41 PAPINIAN, *Replies, book 7:* A person who had several tutors forbade one of them, who was insolvent, to render an account of his management. Since his remission in respect of what he received from the tutelage or obtained by fraud was not a bequest, his fellow tutors, who failed to accuse him of untrustworthiness, can rightly be sued for negligence; for a tutor appointed by will is not liable for negligence which is forgiven in the will.

42 PAPINIAN, *Definitions, book 1:* A judge condemned one tutor out of several to pay the whole sum. The procurator who is proclaimed and appointed for the property will not have the privilege of the *pupillus*, because he is not also appointed to the heir of the *pupillus*; for assistance is given, not to a case, but to a person who particularly deserves favor.

43 PAUL, *Questions, book 7:* When, after the death of the *pupillus*, a debt ceases to be safe, the tutor is released from risk. 1. A man, when he was curator to his brother's daughter, promised that he would give her husband four hundred under the heading of dowry. I ask whether he should receive assistance when, on the emergence of a debt afterward, a dowry beyond the resources of her inheritance has been promised, since on the document these words were written: "The former, as uncle and curator, made a stipulatory promise." The question is altered by the fact that he did not promise that he would give a dowry out of his own property, but because he believed that the account of the *pupilla* would be sufficient. Furthermore, the matter can also be treated in this way, so that if the curator made the promise knowing that there were insufficient means, either he should be held to have made a gift or, since he acted fraudulently, he should receive no assistance. I replied: Since by exceeding his duties the curator made himself liable voluntarily, I do not think he should receive aid from the praetor, no more than if he had promised that he would give money to the girl's creditor. If, however, the person we are discussing promised the dowry not as a donor but as an unauthorized agent, he holds the woman bound; and it can be said that she is liable even while the marriage lasts (because she has the dowry inasmuch as it is said to be in the *collatio bonorum*) or certainly after a divorce (whether the dowry was paid or remains a debt) because she can cause it to be credited to her. But if a woman cannot make her curator fulfill his promise to give a dowry which is beyond the resources of her inheritance, the curator, in fact, will have a defense which frees him in respect of the remainder. The woman,

however, ought to offer a *cautio* to her husband to the effect that if at any time during the marriage she becomes more wealthy, she will reserve the remainder of the dowry for her husband.

44 PAUL, *Questions, book 13:* Persons who take over debts from former curators or tutors and recognize the debts transfer the risk to themselves. 1. But if a *pupillus*, after reaching puberty, accepts his tutor's accounts, and in pursuit of arrears from him then accepts interest, he does not lose his privilege as regards the sale on bankruptcy of the tutor's property; for the praetor ought to preserve his privilege.

45 PAUL, *Questions, book 14:* If a *pupillus* releases one of his tutors from his obligation after reaching puberty, it will be improper for him to try to demand payment from the other in the name of his colleague. We shall say the same in the case of two colleagues in a magistracy when the state accuses one of them. But I considered these facts in the case of the magistrates, as if they were in every way two defendants for the same debt; but this is not so. For if either one is solvent, choice does not find a place. Yet a man who is released from his obligation in time is not like the man who has nothing, but the man who has given security; for he has something to offer the plaintiff.

46 PAUL, *Replies, book 9:* Lucius Titius, the curator of Gaius Seius, at the time of his curatorship, rented the Cornelian farm to Sempronius, and this Sempronius put off the payment of arrears. The *pupillus*, having reached a suitable age, made this same former tenant his procurator. I ask whether the *adulescens*, by reason of the fact that the latter is acting as his procurator, seems to have allowed the entire debt and on that pretext to have released his curator from obligation. Paul replied that it is not the case that because as an adult he wished to have as procurator the person who farmed his estates, he seems to have allowed the debt for arrears on the tenancy. 1. Sempronius, by unilateral promise, became a debtor to his country, and by order of the governor there was *bonorum possessio* by the state. For the property a magistrate of the state appointed three curators, who are called ἐπιμεληταὶ (managers) by the Greeks, who afterward divided the administration of Sempronius's property among themselves without the consent of the state. Certain of these curators, since they were in arrears, ceased to be solvent during the actual period of administration. Afterward the *pupillus*, as Sempronius's heir, who had been kept from the property, procured from the emperor the return of his paternal property. I ask whether it will be right to provide for the indemnity of the *pupillus* out of the property of those who are solvent, since this office of curatorship was imposed undivided by the magistrates. Paul replied that if it seemed right that the *pupillus* should be decreed actions on property against the curators, the magistrates ought to be sued for the share of the one who is insolvent; for the case of tutors is one thing, that of those who administer the business of the state, another. 2. A tutor, who lent at interest money belonging to the *pupillus*, albeit in his own name, does not seem to have acted contrary to the *constitutiones* which prohibit him from diverting pupillary money to his own use. 3. It was asked whether a tutor ought to pay the same interest on money which he has borrowed after the end of the tutelage also up to the date on which the action is accepted. Paul replied that on the termination of the tutelage, the same interest should be calculated as is calculated in the action on tutelage. 4. Paul replied that when a tutor administered a tutelage after puberty, under no compulsion from necessity, but voluntarily, the guarantor who gave security that the property would be safe is not liable for the administration after puberty. 5. A tutor who was sued in an action on tutelage showed his account book; in accordance with this he was condemned and made payment. Afterward, when the *pupillus* wanted to enforce payment from debtors of his father, whose debts were not included in the account book, these persons produced the tutor's receipts. It was asked whether an action was due to him against the tutor or against the debtors. Paul replied that if during the period of administration of the tutelage the debtors made payment to the tutor who was managing the tutelage, they are automatically released from their obligation to the *pupillus*; but if there was an action with the tutor, this same *adulescens* can go to law on account of this case on tutelage and make use of a reply of fraud against a defense of *res judicata*. 6. Two tutors had been appointed by will to a *pupillus*, and one of them died; at the mother's request, another tutor was appointed in his place by the magistrates on the order of the provincial governor, and from him the magistrates required security that the property would be safe. The tutor appointed

by will accused the one appointed later of untrustworthiness. It is asked to what extent he is liable. Paul replied that the tutor appointed by will ought to be sued proportionately in accordance with his share in the administration; but for the share of his fellow tutor, those who bound themselves on his behalf should first be sued, or the magistrates who appointed him; then, if the *pupillus* is unable to obtain the whole sum, one must inquire into the duty of the fellow tutor, whether he ought to have accused him of untrustworthiness, especially when he is also said to have prosecuted him for untrustworthiness. Otherwise, when magistrates appoint several tutors, the *pupillus* cannot return to them before all the tutors have been investigated. In this example where it was suggested that one man was appointed by the magistrates, it did not seem right that his colleague should be sued first, since he both accused him of untrustworthiness and was appointed by will, and accordingly they should be regarded as separate, just as if they had been appointed as tutors over two equal shares of the tutelage. 7. Tutors are permitted to enforce payment of money from debtors of the *pupillus*, so that they are automatically discharged, but certainly not to make gifts to them, or even to come to an agreement with them in order to diminish the debt; and, therefore, a person who pays to the tutor less than is owing can be sued by the *pupillus* for the remainder.

47 SCAEVOLA, *Replies, book 2:* Someone appointed Titius and Maevius as tutors with this proviso: I wish and demand that everything should be done in accordance with the judgment of my brother Maevius and that what is done without him should be invalid. Titius alone enforced payment from the debtors: Have they been discharged? I replied that if he had also given the administration to Maevius, the payment had not been lawfully made. 1. "Let Marina and Januaria estimate the size of the daily allowance which is sufficient for my son." I ask whether the tutors ought to be satisfied with a decision made by women. I replied that the expenses should be settled by the decision of a man of good character. 2. Tutors appointed for the Italian property discovered documents at Rome concerning the provincial debtors to the effect that the money should be paid at Rome or wherever the request was made. I ask whether, since neither the debtors nor the estates were in Italy, this calling in of debts is the business of the tutors of the Italian property. I replied that if the contract was made in the provinces, it is not their business; yet it is central to their duty that the contract should not, through ignorance of the documents, escape the notice of those to whom the administration belongs. 3. A tutor appointed by a mother in her will, since he thought he was tutor, sold off the maternal and paternal property of the *pupilli* and died insolvent. It is asked whether the *pupillus* can have a *vindicatio* of the property. I replied that if the property of the *pupillus* remains, he can recover it by *vindicatio*. 4. A prefect of a legion made this proviso in his will: "I wish that it should be within the power of my son's tutors, if they wish it, to enter in the accounts one per cent of this sum by way of interest, so that the money should not be dispersed." I ask whether, if it is clear that the tutors have lent the money at interest, they ought, in an action on tutelage, to pay one percent interest or in fact the interest which they have stipulated. I replied that if they had opted for the payment of interest as the testator wished and had not lent money at interest in the name of the *pupillus*, the payment which should be made is that which the testator wished. 5. Lucius Titius accepted money on loan from a tutor and gave him as a pledge property due to him by inheritance. After three years, when the *pupilli* whose tutelage had been administered were already *puberes*, the property of the deceased was awarded to the imperial treasury because the heir had not avenged his death. It is asked whether the *pupillus* can repudiate this debt. I replied that according to what is proposed, the responsibility for this debt does not fall upon the tutors. 6. One of two brothers who were partners in property and business died, leaving a son as his heir. The uncle, as tutor, having sold all the merchandise from their joint business and bought it back himself, carried on the business in his own name. It is asked whether he ought to pay the profit from the business or the interest on the money. I replied that according to what is proposed, the interest, not the profit, must be paid to the *pupillus*. 7. A tutor for the Italian property is sued by a creditor from a province where the *pupillus* has property and pays. It is asked whether this can be counted in an action on tutelage. I replied that no reason has been put forward why it cannot.

48 HERMOGENIAN, *Epitome of Law, book 1:* There is a great deal of difference between the

curator of property and of an unborn child, and the curator of a lunatic, and also of a spendthrift or a *pupillus*, since the latter are entrusted with the administration of affairs, but the former two are entrusted only with protection and the sale of property which will deteriorate.

49 PAUL, *Views, book 2:* A tutor will be punished *extra ordinem* for obstinate refusal to demand the payment of interest on pupillary money or failure to purchase estates, if he has not the means to make good the loss.

50 HERMOGENIAN, *Epitome of Law, book 2:* If the property of the *pupillus* is lost through being attacked by robbers or if the banker to whom the tutor gave the money, since he was most distinguished, is unable to return the whole sum, the tutor is not on this account compelled to pay anything.

51 VENULEIUS, *Stipulations, book 6:* If two or more tutors administer a tutelage, a stipulation may be granted through the agency of any one of them against a guarantor, that is, for the whole sum; but if the tutelage is divided among them by areas, which usually happens, and one administers business in the city, the other abroad, then we shall say that a stipulation against a guarantor will either be granted or not granted in accordance with the substance of each defendant. For granted that they are all tutors and manage the tutelage, yet when one of them goes to law or is summoned to judgment about a matter which is outside his own area, he will not be granted a stipulation, just as if the administration of the tutelage had not been entrusted to him. For a general refusal of a stipulation has the same effect as a specific refusal in the matter concerning which there is a lawsuit.

52 NERATIUS, *Replies, book 1:* A curator should not only give a dowry on behalf of a *minor* but also cover the expenses which must be incurred for the wedding.

53 PAUL, *Decrees, book 2:* Aemilius Dexter, during his term as magistrate, failed to enforce the giving of security when he appointed tutors, then, when some of them were given exemption by the succeeding magistrates, Dexter was chosen as tutor. On his appointment, he was sued for the whole sum on two counts, because when he was a magistrate and had appointed tutors, he had not enforced the giving of security. It was decided to the contrary that granted that security had not been enforced, yet up to the date on which the tutelage ended the tutors were solvent and that an omission on the part of the curators ought not to be prejudicial to the tutors. He decided that if the tutors had continued to be solvent up to the date on which the tutelage ended, albeit that security had not been enforced, the risk belonged to the curators, but if not, to the tutors and the magistrates. That is, when, on the termination of the tutelage, the tutor is found not to have been solvent, then the risk falls upon the person who failed to accuse him of untrustworthiness or to enforce security.

54 TRYPHONINUS, *Disputations, book 2:* I do not think that a man who has accepted money belonging to the *pupillus* on loan from his fellow tutors and has given a *cautio* and has promised to pay an agreed rate of interest which the other debtors pay to the *pupillus* should be subjected to the highest rates of interest. For he has not consumed it for himself, nor has he made use of the money secretly, or unrestrainedly as if it were his own, and if the loan for consumption had not been given to him at this rate of interest by a fellow tutor, he would have received one from someone else. Indeed, it makes a great deal of difference whether he publicly and openly makes himself a debtor as if he were a stranger and just anyone at all or whether, under the cover of his administration of the tutelage and concealing the advantage to himself, he assists his own profit with the money of the *pupillus*.

55 TRYPHONINUS, *Disputations, book 14:* Three tutors were appointed for a *pupillus*; the first of them managed the tutelage and was not solvent; the second entrusted its management to Titius, and Titius carried out some part of the administration; the third took absolutely no part in the management. It was asked to what extent each of them is liable. Indeed, in the administration of a tutelage the risk is shared by the tutors, and they are all together liable for the whole sum. Clearly, if the ready money belonging to the *pupillus* was shared between them, each of them will not be liable for a greater sum than he received. 1. But if the tutors themselves have stolen the property of the *pupillus*, let us see whether, by the action which is set out in the *Law of the Twelve Tables* against a tutor for double the sum involved, they are liable as individuals for the whole sum and whether, even though one of them has paid the double amount, the others, nonetheless, are liable. For in other cases, where several thieves have stolen the same property, the rest cannot plead for

pardon from punishment by reason of the fact that one of them has already paid the penalty. Tutors, however, because they have accepted the administration, are seen not so much as appropriating the property against the owner's will, as betraying their trust. Finally, let no one say that one tutor should pay both the double amount on this action and either the property itself or its estimated value as if under the pretext of a *condictio*. 2. Therefore, someone who entrusted the management of a tutelage to another is not the only person who is believed to have managed a tutelage but also someone who accepted security from a fellow tutor that the property would be safe for the *pupillus* and allowed him to administer the entire tutelage; nor can he plead in his defense the *constitutiones* which order that the man who managed the tutelage should be sued first. 3. Likewise, in the case where no one has managed the tutelage, the risk certainly does not fall upon the person who has undertaken some part of the management, but jointly upon all; for he alone ought not to pay the penalty for the risk incurred on account of the other matters which he did not undertake, except where any of them are such as to either require him to complete what was begun, or are so linked that they ought not to be separated. 4. Since, however, it is said that the fellow tutors ought to prove that a person has ceased to be solvent or is not solvent, let us see what this means, that is, whether it is sufficient that there has been no diminution of the wealth of a fellow tutor from the time at which he was appointed and that the outward appearance of his inheritance has remained the same or whether, even if nothing has happened since which would obviously cause a diminution of his inheritance, a fellow tutor, nevertheless, ought to inquire into his colleague's fortune. But to this end he ought to accept another valuation, both as regards his worth of character and as regards the interval of time from when the will was made, up to the time of the father's death; for he ought not to entrust the administration to a fellow tutor who is obviously a spendthrift or whose property has been sold (albeit that the praetor, who appointed him by decree, was deceived), and it is possible that the father was ignorant of something which happened after he had made his will or that although he had the intention of changing his will, he did not do it.

56 SCAEVOLA, *Digest, book 4:* A tutor made a sale of property and animals belonging to the *pupillus*, but when the buyers did not pay the price, he held back certain animals and kept them at his own house and entered this same price as a credit in the accounts of the *pupillus*. Several offspring were born to these animals. On the death of the tutor, his heir administered the same tutelage and possessed the animals for many years. It is asked whether, when the person whose tutelage has been administered was twenty-four years old, he could lawfully claim the animals by *vindicatio*. He replied that according to what was proposed, the *pupillus* was unable to claim them by *vindicatio*.

57 SCAEVOLA, *Digest, book 10:* When the debtors' bonds were burned up in a fire, although the tutors were able to sue them on the inventory for the payment of the money or compel them to renew the debt and although they had done this in the case of former debtors in the same situation, they omitted to do so in the case of the debtors of the *pupilli*. If the *pupilli* have suffered any loss on account of this omission, should they succeed in obtaining damages in an action on tutelage? He replied that if it was proved that the tutors overlooked this through fraud or negligence, they ought to pay damages. 1. A man was banished by decision of the governor and his goods confiscated; when he was given the emperor's leave to appeal, but the man who had pronounced sentence had not received the appeal, the *pupillus* bought a farm from him with the authorization of his tutors; and when the appeal was dismissed, the farm was taken away from him. It was asked whether the *pupillus* can obtain the price of the farm from the tutors by an action on tutelage. He replied that if they knowingly bought it from someone who was in the position of being under sentence from a previous decision, they are liable in an action on tutelage.

58 SCAEVOLA, *Digest, book 11:* A man who used to carry out his business through the agency of Pamphilus and Diphilus, formerly slaves, later freedmen, left them as tutors in his will with the proviso that business should be carried out in the same way as it was carried out when he was alive. These persons administered the tutelage not only when their patron's son was *impubes*, but even after he reached puberty. But while Diphilus presented accounts showing the increase in business, Pamphilus, on the other hand, thought that it was necessary to render accounts not for an increase in business, but for the computation of interest, as is usual in the action on tutelage. It was asked whether Pamphilus also ought to render an account in accordance with the deceased's wishes on the example of

Diphilus. He replied that he ought to do so. CLAUDIUS TRYPHONINUS: because he ought not to make a profit from the tutelage. 1. Of the two tutors of a *pupillus*, one died while the *pupillus* was still *impubes*, and the one who survived in the name of his *pupillus* after the appointment of a judge obtained with interest the amount which had come to the deceased tutor out of the tutelage. It was asked whether, by the action on tutelage on which one can sue after reaching puberty, interest would be forthcoming only on that portion which had initially come to the deceased tutor as from the accounts of the tutelage or also on the sum which, having been increased for the *pupillus* by interest on the capital, was transferred after his death to the survivor equally with the capital or ought to have been transferred. He replied that if he had diverted the money to himself, interest must be paid on all the money, but if the money had remained in the account of the *pupillus*, he must pay what in good faith he had received or could have received; but if, although he could have lent it at interest, he neglected to do so, then he pays or ought to pay to him who is to receive it, the sum instead of the capital, which another debtor would pay as interest and capital. 2. Tutors appointed by a will which seemed to have been made void failed to administer the tutelage, and a tutor was appointed to the *pupillus* by the governor, but the tutors who had been appointed by will were also ordered to administer the tutelage in conjunction with the man who had begun to administer it after being appointed by the governor. It was asked whether the tutors appointed by will incurred any risk relating to the period of the preceding administration, either from the date on which the will was opened or from the date on which the order was given. He replied that those about whom the question was asked incurred no risk in relation to the preceding period of time. 3. A man instituted the *pupillus* as his heir and bequeathed to his disinherited daughter two thousand gold pieces and appointed the same tutors for each of them. It was asked whether, from the date on which they could have invested the two thousand from the substance of the inheritance in loans and failed to do so, they are liable in respect of the interest to the *pupilla* in an action on tutelage. He replied that they are liable. 4. It was asked whether, when the interest on the pupillary money which the tutors owe is transferred to a curator, it should be added to the capital, and the curators should begin to owe interest on the sum as a whole. He replied that the case of all money which passes to curators is alike, because it all becomes capital.

59 SCAEVOLA, *Digest, book 26:* When an inheritance from a father was burdened by debt and the property was in such a state that the *pupilla* was kept from her paternal inheritance, one of the tutors came to this decision with the majority of the creditors that they should be content with, and should receive, a certain portion of the loan; the curators who had been accepted for the already marriageable girl came to the same decision with the majority of the creditors. It was asked whether, if one of the tutors, as a creditor of the father of the *pupilla* had made sure that the entire sum of money was paid to him with interest out of the property of the *pupilla*, it could be reduced by the curators of the *pupilla* to the same portions as the other creditors also had received. He replied that the tutor, if he urged the others to accept a portion, ought to be content with the same share.

60 POMPONIUS, *Letters, book 8:* If a tutor's heir completes business which the tutor began, he will also be liable in an action on tutelage on that account.

61 POMPONIUS, *Letters, book 20:* In Aristo, this is written: Because, by the negligence of his tutor, a *pupillus* ceases to be in possession of an inheritance, without any doubt he should be assessed for damages in the suit for the inheritance, provided that a guarantee had been given to the *pupillus* concerning the inheritance. It seems right that a guarantee should be given even if the tutor is solvent, so that it is possible to get back safe from him the loss which the *pupillus* suffered from the valuation of the matter in issue. But if the tutor is not solvent, one must see whether it ought to be regarded as the misfortune of the *pupillus* or the claimant's loss and so he ought to be liable, and if the property had been lost purely by chance, it is as if the *pupillus* himself, without negligence, had diminished, ruined, or destroyed some part of his inheritance. It can also be asked of a defendant who is a lunatic, if it should happen that anything ceased to exist as a result of his lunacy. What do you think? Pomponius: I think he is right. But why do you hesitate, if the tutor is not solvent, over whose the loss ought to be? Since in other respects he was able to say more elegantly that

only those actions which a *pupillus* has with a tutor can be offered to the vendor of an inheritance, just as an heir or *bonorum possessor*, if nothing happened through his negligence (for instance, if he was driven out from his inherited estate by force or an inherited slave is wounded by someone without negligence on the part of the *possessor*) ought to offer nothing more than the actions which he has on that account. The same must be said if something is lost by the curator of a lunatic through negligence or fraud, just as if a tutor or curator had taken a stipulation for something or had sold property belonging to an inheritance. But I think that what happens as a result of lunacy should be allowed to go unpunished, just as if it had happened purely by chance, not through any person's act.

8

THE AUTHORITY AND CONSENT OF TUTORS AND CURATORS

1 ULPIAN, *Sabinus, book 1:* Although it is a rule of the civil law that a tutor cannot authorize dealings concerning his own property, yet a tutor can provide authorization for the *pupillus* to accept the inheritance of a debtor of his, the tutor's, own, although by this the *pupillus* becomes his debtor; for the principal reason for the authorization is that the *pupillus* should become the heir, but as a consequence it comes about that he takes up the debt. He cannot, however, on his own authority, take a stipulation from him. And when a certain man provided authorization for his *pupilla* to give a stipulatory promise to his slave, the deified Pius Antoninus issued a rescript to the effect that the *pupilla* was not liable by law, but that an action would be granted in respect of the extent of the increase in her wealth. But if he authorizes that something should be handed over to his son, the authorization will be void; for clearly he will acquire property by his authorization. 1. If a tutor is retained against his will by force, his acts will not be valid; for bodily presence is not sufficient for authorization, for instance, if someone kept silent, being overcome by sleep or epilepsy.

2 ULPIAN, *Sabinus, book 24:* There is no difference whether a tutor's authorization is not given or whether it is wrongly used.

3 PAUL, *Sabinus, book 8:* Even if a tutor gives his authority without being questioned, his authorization is valid, since he says that he approves what is being done; for this is the meaning of authorization.

4 POMPONIUS, *Sabinus, book 17:* Even if several tutors have been appointed, the authorization of one should suffice; if, however, a tutor to whom the administration of the tutelage has not been entrusted authorizes something, this ought not to be ratified by the praetor. And, therefore, I think the decision of Ofilius is better, that if, on the authority of a tutor who does not manage the tutelage, I buy something from the *pupillus*, knowing that another tutor is the manager of his tutelage, I cannot become the owner. It is the same if I buy on the authority of one who has been removed from the tutelage; for it cannot be ratified.

5 ULPIAN, *Sabinus, book 40:* A *pupillus* cannot be made liable to his tutor on the latter's authority. Clearly, if there are several tutors, and the authorization of one of them suffices, it must be said that the *pupillus* can be made liable to him on the authority of another, whether he gives him money on loan or takes a stipulation from him. But when someone who is sole tutor gives money on loan to the *pupillus* or takes a stipulation from him, the latter will not be liable to the tutor; however, he will naturally be liable in respect of the increase in his wealth. For the deified Pius issued a rescript that an action would be granted against a *pupillus*, not only to a tutor but to anyone in respect of the increase in his wealth. 1. A *pupillus* does not become liable by selling without his tutor's authorization, nor by buying, except in respect of the increase in his wealth. 2. Likewise, the tutor cannot himself perform the function of both buyer and seller; but if, in fact, he has a fellow tutor whose authorization is sufficient, he can without doubt buy. But if the purchase has come about dishonestly, it will be invalid, and there can be no usucapion. Certainly, if on coming of age the *pupillus* approves the purchase, the contract is valid. 3. If, however, he buys the property of

the *pupillus* through a third party, he is in the situation where the purchase is invalid, because he seems to not to have acted in good faith; and there was a rescript to this effect by the deified Severus and Antoninus. 4. Certainly, if he himself made the purchase openly, but gave an assumed name, not dishonestly, but simply because it is customary for men of noble birth not to allow their names to be written on documents, the purchase is valid; but if he did this through cunning, it will be the same as if he had made the purchase through a third party. 5. Also if a creditor of the *pupillus* sells off the property, in the same way, he can purchase it in good faith. 6. If the tutor's son or any other person dependent on him makes the purchase, it will be the same as if he himself has made the purchase.

6 POMPONIUS, *Sabinus, book 17:* It seems right that tutors who have not been given the power of administration should be able to buy from the *pupillus* as if they were strangers.

7 ULPIAN, *Sabinus, book 40:* What we have said, that a tutor cannot provide authorization where his own property is concerned, is true whenever a stipulation is procured for him through his own agency or that of persons subject to him; but, as has been said, his authorization in no way prevents a transaction being carried out for him as a consequence. 1. If there are two defendants taking a stipulation, and one of them takes a stipulation from the *pupillus* on my authority, the other on the authority of another tutor, it must be said that the stipulation is valid, but only if the authorization of one tutor is sufficient; but if it is not sufficient, it must be said that the stipulation will be useless. 2. If a father and a son who was in his power were tutors and the father took a stipulation on his son's authority, the stipulation will be void for the reason that the son cannot authorize where his father's property is concerned.

8 ULPIAN, *Sabinus, book 48:* Even if there is a conditional contract with a *pupillus*, a tutor ought to authorize it absolutely; for his authorization must be given not conditionally, but absolutely, in order to confirm the conditional contract.

9 GAIUS, *Provincial Edict, book 12:* A *pupillus* cannot be made liable on every contract without his tutor's authorization, but he can acquire something by stipulation and by accepting delivery even without his tutor's authorization; but he cannot make anyone liable to him by a loan, because he cannot alienate anything without his tutor's authorization. 1. By reason of this fact that the *pupillus* cannot alienate any property without his tutor's authorization, it appears that he is also unable to manumit without his tutor's authorization. Furthermore, granted that he can manumit with his tutor's authorization, he must, in accordance with the *lex Aelia Sentia*, show good cause before a council. 2. A *pupillus*, in any and every case where he makes payment without his tutor's authorization, acts ineffectively, because he cannot transfer ownership; but if a creditor in good faith takes up the money of the *pupillus*, the latter will be discharged. 3. A *pupillus* cannot accept an inheritance without the authorization of his tutor, even though it is profitable and will not cause him loss. 4. Nor, in accordance with the *senatus consultum Trebellianum* can a *pupillus* recover an inheritance without his tutor's authorization. 5. A tutor ought to authorize immediately by being present during the negotiation; indeed, authorization given later in time or by letter is ineffective. 6. Even if the person making the contract with the *pupillus* does not actually hear the tutor's authorization, but it is confirmed in writing, the business is properly carried out, as if, for instance, I sell or lease something to a *pupillus* who is absent, and he agrees to it with his tutor's authorization.

10 PAUL, *Edict, book 24:* A tutor who is unable, through ill-health or absence or some other lawful reason, to give his authorization is not liable.

11 GAIUS, *Provincial Edict, book 15:* If a *pupillus* or a lunatic is affected by *bonorum possessio*, in order to settle the matter, it seems right to consider the wishes of the tutor or curator both in claiming and in repudiating *bonorum possessio*. Certainly, if they do anything contrary to the interests of the *pupillus* or the lunatic, they will be liable in an action on tutelage or curatorship.

12 JULIAN, *Digest, book 21:* If a slave, owned jointly by you and Titius, takes delivery of some property from your *pupilla* on your authority, it will belong entirely to Titius. MARCELLUS notes: For our ancestors approved the principle that anything which could not belong to all the owners should belong as a whole to the one by whom it can be acquired.

13 JULIAN, *Digest, book 21: Impuberes* can be made liable on their tutor's authority even if they remain silent; for when they have accepted money on loan, although they say nothing, they are liable when the tutor's authorization has been given. And, therefore, if money that was not owing was paid to these persons, although they remained silent, the giving of the tutor's authorization will be sufficient to make them liable on *condictio.*

14 JULIAN, *Digest, book 31:* It makes little difference whether a tutor was absent when business was being transacted or, though present, was ignorant of the nature of the transaction.

15 MARCIAN, *Rules, book 2:* The same tutor can give authorization to both the defendant and the plaintiff. But is this done in such a way that he gives his authorization twice, or is one authorization sufficient with the intention that it should apply to both of them? Pomponius, indeed, is doubtful, but it is stoutly maintained that one authorization is sufficient.

16 PAUL, *Lex Aelia Sentia, book 1:* Even if a tutor becomes blind, he can give authorization.

17 PAUL, *Edict, book 6:* If a tutor refuses to give his authorization to a *pupillus*, the praetor ought not to compel him, first, because it is wrong that he should be compelled to give his authorization even if there is no benefit to the *pupillus*, and second, because if there is such a benefit, the *pupillus* can obtain damages by an action on tutelage.

18 PAUL, *Plautius, book 1:* A *pupillus* can, on his tutor's authority, transfer his debtor to Titius; but when the tutor owes money to the *pupillus*, it must be said that neither can there be a transfer nor can a procurator be appointed against the tutor on the tutor's own authority, because it would result in his being discharged on his own authority.

19 PAUL, *Replies, book 9:* A curator can be appointed even to an *impubes*, but for the settlement of those matters which require the formality of the law, there is need of a tutor's authorization.

20 SCAEVOLA, *Digest, book 10:* There was a division of their paternal inheritance between *pupilli* in the presence of their tutor, but the latter did not sign the document attesting the division. It was asked whether he must stand by it. He replied that if the tutor had authorized it, he must stand by the division nonetheless even if he had not signed.

21 SCAEVOLA, *Digest, book 26:* With his tutor as defendant a *pupillus* was condemned on a contract made by his father and accepted a curator. Between the latter and the creditor proceedings were brought before the imperial procurator which are described below. Priscus, the imperial procurator said: "Let the matter be brought to judgment." Novellius the curator said: "I keep the *pupillus* from his inheritance." Priscus, the imperial procurator said: "You have a reply; you know what you ought to do." It was asked whether, according to these proceedings, the *adulescens* was kept from his father's property. He replied that it is supposed that he has been kept from it.

22 LABEO, *Plausible View, book 5:* If there is any action which a *pupillus* can take which would discharge his tutor, it cannot lawfully be carried out on the authority of the tutor himself.

9

WHEN THERE IS AN *ACTIO IN FACTUM* BETWEEN *MINORES* AND A TUTOR OR CURATOR

1 POMPONIUS, *Sabinus, book 29:* Aristo says, but I do not agree, that a *pupillus* who is a defendant in possession can be condemned, on account of his tutor's fraud or negligence, to pay the amount of the plaintiff's oath as to value in issue; yet this is the case if the *pupillus* can get back his property intact from the tutor.

2 ULPIAN, *Opinions, book 1:* If a tutor or curator has lent out money belonging to the person whose affairs he administers and has taken a stipulation or bought estates in his own name, an *actio utilis* is given to the owner of the money to claim the property or to enforce payment of the loan.

3 PAPINIAN, *Questions, book 20:* Fraud on the part of the tutors ought neither to harm nor benefit a boy; but what is commonly said, that a tutor's fraud does not harm the *pupillus*, is true only when the *pupillus* does not become richer as a result of the tutor's fraud. There-

fore, Sabinus justly thought that a *pupillus* could be sued in an action concerning payment as a result of his tutor's fraud, certainly if the tutor benefited the accounts of the *pupillus* by an unfair division of money. This must also be said in the case of an action on a deposit and also a claim for an inheritance, as long as it can be proved that what was lost through the tutor's fraud was transferred to the account of the *pupillus*.

4 ULPIAN, *Edict, book 64:* But if a tutor does anything fraudulent which does not concern him, no harm ought to befall the *pupillus*.

5 PAPINIAN, *Replies, book 5:* After the death of a lunatic, an action on a judgment will not be granted against the curator who managed his affairs, any more than it would be granted against tutors, as long as it is certain that no renewal of debts was made with his consent after he had resigned his office, and that no obligation was transferred to the curator or tutor. 1. A tutor who gave security that he would pay money which the father of the *pupillus* had been condemned to pay can rightly defend an action after the termination of the tutelage. The same is not true in the case of a man who has received a loan of money in his own name and brought the matter to judgment on behalf of the *pupillus*, unless perhaps the creditor made a contract to the effect that the money should pass into a suit on a judgment.

6 PAPINIAN, *Definitions, book 2:* When the praetor gave his decree, the tutor turned over the case to his agent. The decision having gone in favor of the agent, the action on the judgment is transferred to the *pupillus* just as if the tutor had obtained it.

7 SCAEVOLA, *Questions, book 13:* Assistance is given to a tutor who is defending an *infans*, so that an action on a judgment is granted against the *pupillus*.

8 SCAEVOLA, *Replies, book 5:* A tutor, who was also a co-heir with the *pupillus*, himself gave security for the whole sum when he was sued in a case of *fideicommissum*. It was asked whether an *actio utilis* should be granted proportionately against the *pupillus* when adult. He replied that it should be granted.

10

UNTRUSTWORTHY TUTORS AND CURATORS

1 ULPIAN, *Edict, book 35:* This clause is both normal and very necessary; for every day tutors are charged with untrustworthiness. 1. First therefore, let us consider the source of the offense of untrustworthiness and in what court a tutor or curator can be charged with untrustworthiness; next who can be removed from office, by whom, and for what reasons, and concerning the penalty for untrustworthiness. 2. It must be known that the offense of untrustworthiness comes down to us from the *Law of the Twelve Tables*. 3. We, however, grant the right of removing untrustworthy tutors at Rome to the praetors, and in the provinces, to their governors. 4. There is some doubt whether it is possible for a charge of untrustworthiness to be brought before the legate of a proconsul, but the Emperor Antoninus and the deified Severus issued a rescript to Bradua Mauricus, the proconsul of Africa, saying that it is possible, since by committing legal authority to him the function of pronouncing judgment passes to him in its entirety. Therefore, if the praetor commits legal authority to anyone, similarly it must be said that a charge of untrustworthiness can be brought before the person to whom it was committed. For although this rescript was issued in a provincial case, it follows that a man to whom legal authority has been committed by the praetor can also hear a case of untrustworthiness. 5. We have shown those who have the power to hear a case of untrustworthiness; now let us see who can be accused of untrustworthiness. And indeed, all tutors can, whether they are appointed by will or whether they are not, but are tutors of the other sort. Therefore, if a person is a statutory tutor, he can be accused. But what if he is a patron? The same must still be said, provided that we remember that we must spare the patron. 6. The next thing is that we should see who is able to bring a charge of untrustworthiness; and it should be known that this action is as it were public, that is, that it is open to all. 7. Furthermore, even women are admitted, but only those who take this step under the compulsion of duty and necessity, as for example, a mother. A nurse also and a grandmother can bring a charge. So can a sister; for in the case of a sister, there even exists a rescript of the deified Severus; and if there is any other

woman whose deliberate sense of duty is perceived by the praetor although she does not go beyond the modesty of her sex, but was induced by her sense of duty not to conceal the wrong done to the *pupilli*, the praetor should allow her to make an accusation. 8. If someone of plebeian origin is accused before the praetor of having committed very dreadful acts in a tutelage, he should be handed over to the urban prefect for severe punishment.

2 ULPIAN, *All Seats of Judgment, book 1:* A freedman also who is proved to have acted fraudulently in the management of the tutelage of his patron's sons should be handed over to the urban prefect for punishment.

3 ULPIAN, *Edict, book 35:* A tutor can also accuse a fellow tutor of untrustworthiness, whether he himself continues as tutor or whether he has ceased to be tutor but his colleague remains; and the deified Severus issued a rescript to this effect. Moreover, the deified Pius issued a rescript to Caecilius Paetinus that a tutor who had been removed as untrustworthy can accuse his fellow tutors of untrustworthiness. 1. It is also acceptable for freedmen of *pupilli* to accuse of untrustworthiness tutors or curators who are mismanaging the property of their patrons or their patrons' children; but if they wish to accuse their own patron of being untrustworthy in a tutelage, it is better for the freedmen to be prevented from bringing an accusation, lest in the trial itself something more serious emerges, since this accusation is open to everyone else. 2. Not only the curator of an *adulescens* but also the curator of a lunatic or a spendthrift can be removed as untrustworthy. 3. Even if someone administers the curatorship of an unborn child or of property, he will not be free from fear of this charge. 4. Moreover, it must be seen whether an untrustworthy person can be removed even without a formal accusation. The better view is that he ought to be removed, if it is plain to the praetor from the clearest evidence on the matter that he is untrustworthy; this view must be accepted for the good of *pupilli*. 5. Now let us see for what reasons untrustworthy persons should be removed. It should be known that one may accuse someone of untrustworthiness either on account of a fraud committed in a tutelage, if perhaps he has plundered the tutelage or if he has behaved meanly or ruinously toward the *pupillus* or stolen anything from the pupillary property while he was tutor. But if he did any of these, but did it before he became tutor, even though it concerns the property of the *pupillus* or the tutelage, he cannot be accused of being an untrustworthy tutor because the offense preceded the tutelage. Accordingly, if he robbed the *pupillus* of his substance, but before he was tutor, he ought to be accused on a charge of robbing an inheritance, if not of theft. 6. It can be asked whether, if a *pupillus* had a tutor, and the same person was appointed as curator when the boy became *adulescens*, he can be charged with untrustworthiness as a result of offenses during the tutelage. And since he can be sued on the tutelage by fellow curators, the consequence will be to say that an accusation of untrustworthiness is not available, because there can be an action on tutelage when the office has been resigned and another taken up. 7. The same question will be asked also, if you suppose that someone ceased to be tutor and began again (for example, if he had been appointed for a certain time or upon a certain condition, then was afterward appointed a second time, either upon a subsequent testamentary condition or even by the praetor), whether he can be charged with untrustworthiness; and because there are two tutelages, if there is someone who can sue him in an action on tutelage, it will be most fair to say that the charge of untrustworthiness is unavailable. 8. But if he is actually sole tutor, do you think, because an action on tutelage is unavailable he should be removed from this administration on the grounds of being untrustworthy in this administration by reason of the fact that he behaved badly in another? Then the same can also be said in the case of someone who was confirmed as sole curator after the termination of the tutelage. 9. If, however, someone was appointed as tutor in these words, "as long as he is in Italy, let him be tutor" or "as long as he does not cross the sea," can he be charged with untrustworthiness as a result of the management which he carried out before his absence overseas? The better view is that he can be charged on the grounds that it is a single tutelage with intermissions. 10. If someone about to be absent on public business wanted another tutor to be appointed in his place on his return, could he be charged with untrustworthiness as a result of what he did before? And since he can be sued in an *actio utilis* on his former management, the charge will be unavailable. 11. If a curator appointed for an unborn child and for property behaved fraudulently and then was appointed tutor, it can be doubted whether he can be

charged with untrustworthiness on account of fraud committed in the curatorship. In fact, if he has fellow tutors, he cannot be charged, because he can be sued; if he has not, he can be removed. 12. If the tutor is an enemy of the *pupillus* or his relatives and in general if any lawful reason why he ought not to be involved in the tutelage influences the praetor, he ought to reject him. 13. Severus and Antoninus issued a rescript to Epicurius that tutors who sold prohibited property without a decree had indeed acted ineffectively, but if they had done it with fraudulent intent, they ought to be removed. 14. A tutor who does not use his means to provide maintenance for his *pupillus* is untrustworthy and can be removed. 15. If, however, he does not keep out of court, but appears and asserts that no maintenance can be decreed on the grounds of poverty, and if he is convicted of falsehood by the advocates appointed to the *pupillus*, he should be handed over to the urban prefect; for there is no difference between someone who acts in such a way as to be appointed tutor by bribing the good faith of the inquiry or someone who is appointed in good faith but oppresses another's property like a robber. Such a person, therefore, should not be removed, but should be handed over to be punished by the penalty which is usually inflicted upon those who have bribed their way into a tutelage by corrupting the praetor's officials. 16. Those who obstinately persist in collecting money for the purchase of estates, without investing the money until an opportunity for purchase is found, are ordered to be confined in the state prison and, moreover, are held to be untrustworthy. But it should be known that they ought not all to be treated with this severity, but only those of humble birth; for I do not think that those who have been placed in some position of rank ought to be confined in the state prison. 17. A tutor who inconsiderately or fraudulently keeps a *pupillus* from an inheritance can be charged with untrustworthiness. 18. Someone who has been removed because of dilatoriness or boorishness, idleness, simpleness, or silliness is in the position of being able to leave the tutelage with his reputation intact. Also if a man fails to remove someone on account of fraud and instead joins with him, the latter will not be *famosus* because he was not ordered to leave the tutelage.

4 ULPIAN, *All Seats of Judgment, book 1:* These are the reasons which permit a person to leave a tutelage or curatorship with his reputation intact. 1. It will be necessary that the reason for removal is indicated in the decree, so that it is clear concerning the person's reputation. 2. What, then, if the praetor has not indicated in his decree the reason for removal? Papinian says that such a person ought to be said to be of untarnished character, and this is true. 3. If the praetor in his verdict has not removed the man from the tutelage, but has prohibited him from managing it, it must be said that it is better that he should cease to be tutor. 4. Those who have taken no part in the management cannot be charged with untrustworthiness, but they can be removed because of idleness or negligence or fraud, if they have acted fraudulently.

5 ULPIAN, *Disputations, book 3:* Someone who gave security or now offers to do so can also be charged with untrustworthiness; for it is advantageous to the *pupillus* that his property should be safe rather than that he should have records of a *cautio* that the property would be safe. Nor is a fellow tutor to be tolerated if he fails to accuse his colleague of untrustworthiness simply because he had given a *cautio* to the *pupillus*,

6 CALLISTRATUS, *Judicial Examinations, book 4:* because the giving of security does not change the tutor's malevolent intent, but affords him the means of plundering the family property for a longer period of time.

7 ULPIAN, *All Seats of Judgment, book 1: Impuberes* are not permitted to bring accusations of untrustworthiness; *adulescentes* who clearly wish to do so are allowed to accuse their curators of untrustworthiness, as long as they do so on the advice of their relatives. 1. If fraud has not been committed, but there has been negligence, because that comes close to fraud, the man in this case ought to be removed as if untrustworthy. 2. Furthermore, there have been certain special cases arising from a letter of our emperor and the deified Severus to Atrius Clonius; for it is directed that those who persist in refusing to make provision from their own resources, so that maintenance cannot be decreed, should be deprived of their property, and in order to safeguard the property, the *pupillus* should be put in possession where a man was charged with untrustworthiness on the emperor's decision; and anything which is likely to deteriorate through delay is ordered to be sold on the appointment of a curator. 3. Again, if anyone who is appointed tutor does not appear,

it is customary for him to be summoned by edicts, and finally, if he has not made provision from his own resources to be removed as untrustworthy by reason of the fact that he has not made provision, this must be done both very seldom and after holding a careful inquiry.

8 ULPIAN, *Edict, book 61:* We think someone an untrustworthy tutor if he is of such a character as to make him untrustworthy; but a tutor who, although he is poor, is nevertheless loyal and careful should not be removed as untrustworthy.

9 MODESTINUS, *Advice on Drafting, sole book:* If a tutor has been joined to the *pupillus* by some tie of necessity or kinship or if a patron has undertaken to manage the tutelage of a freedman *pupillus* and it seems proper that any one of these should be removed from the tutelage, the best thing to do is that a curator should be joined with him rather than that he should be removed with a slur upon his good faith and reputation.

10 PAPINIAN, *Questions, book 12:* Someone who is removed as untrustworthy by decree of the praetor has no fear of the risk of prosecution at a future time; for it seems unjust that a person, in fact, should be removed from a tutelage or curatorship, but not be secure for the future.

11 PAPINIAN, *Replies, book 5:* After the termination of a tutelage, the *cognitio* of a tutor for untrustworthiness is canceled, even though it was accepted before.

12 JULIUS AQUILA, *Book of Replies:* No reason has been put forward why a curator in a *cognitio* for untrustworthiness should be able to object to the praetor's discretion informed by a slave of the *pupillus* for the disclosure of fraud.

BOOK TWENTY-SEVEN

1

EXCUSES

1 MODESTINUS, *Excuses, book 1:* Herennius Modestinus to Egnatius Dexter. I send you a commentary which I have written entitled "Excuses from Tutelage and Curatorship," which appears to me to be most useful. 1. I shall do what I can to make the exposition of the problems clear, translating technical terms into Greek, although I know that such translation is not particularly suitable. 2. In the course of the work, I will include the original terms of provisions where they are required so that by providing both the text and commentary, we shall provide both what is necessary and what is useful. 3. We must deal first with those who cannot be appointed. 4. Provincial governors should not appoint freeborn persons as tutors or curators to the orphaned children of freedmen, unless indeed there are no freedmen at all in the district. For a legislative speech of the deified Marcus provides that only freedmen of the same district should be appointed for orphaned freedmen. The deified Severus, however, provided that if someone were appointed for the protection of the *minores*, he should be accountable for the tutelage if he did not plead an excuse in good time. 5. The senate rules that it is not possible for someone to be curator of his wife; one so appointed will be excused.

2 MODESTINUS, *Excuses, book 2:* Those who have reached seventy years of age are excused from tutelage and curatorship. They must have completed their seventy years when they were appointed, that is, either when someone enters upon inheritance or when the condition for the appointment has been fulfilled, and not during the time set for seeking exemption. 1. Age is proved either by birth certificate or by other usual evidence. 2. Someone who has a number of children has an excuse from tutelage and curatorship. 3. But they must all be legitimate children, even though they are not all in power. 4. The children must be alive when their fathers are appointed tutors. Any who have previously died are not counted; nor, conversely, does it matter that some die afterward; this is settled by a *constitutio* of the deified Severus. 5. Although this refers to a tutor appointed by will, it applies also in all other cases. 6. Although a child in the womb is in many areas of the law taken to be already born, nevertheless, neither in this field nor in the other fields of public duties can he assist a father, and this is provided in a *constitutio* of the deified Severus. 7. Grandchildren of sons, both male and female, give exemption from tutelage as well as sons and daughters. They assist their grandfather by taking the place of their deceased father. However many grandchildren there are of one son, they are only equal to one child. This is all drawn from those *constitutiones* which refer to children; for it is not easy to discover a *constitutio* that speaks of sons as opposed to offspring, which word can also mean grandchildren. 8. The number of children fixed by the *constitutiones* must be alive when the father is appointed, not between the appointment and the application for exemption. Those born after that moment are of no significance, as is provided in a

constitutio of Severus and Antoninus. 9. Moreover, those who are already administering three tutelages or three curatorships or three tutelages and curatorships all told, which are still in existence, that is, where the *pupilli* are not yet of age, are exempt from a fourth tutelage or curatorship. Indeed, a curator of a lunatic rather than of a *minor* can count this last among the number of curatorships; this very point is stressed by a *constitutio* of Severus and Antoninus, and the most excellent Ulpian says the same about three tutelages.

3 ULPIAN, *Duties of the Tutelary Praetor, sole book:* The administration of three tutelages gives exemption. By three administrations, however, is meant not that having that number of *pupilli* amounts to that number of tutelages, but rather three separate inheritances. So someone appointed tutor to three brothers who shared an undivided inheritance, or tutor to some of them and curator to others, is reckoned to have undertaken one tutelage.

4 MODESTINUS, *Excuses, book 2:* We have said that one who has three tutelages already is not to be appointed to a fourth. If someone who already has two tutelages is then proposed for a third and challenges it and, while awaiting the hearing of that proposal, is proposed to a fourth tutelage, can he plead the third in relation to the fourth, or is it altogether disregarded? And I discover from a *constitutio* of the deified Severus and Antoninus that someone must not be appointed to a fourth tutelage while a hearing is in progress about a third; but having awaited the outcome of the pleading about the third appointment, he should then await the outcome of the fourth. This is reasonable; for if the fourth in order is undertaken, so becoming the third in fact, and an incorrect judgment is given in the application about the third, he will be charged with four tutelages contrary to law. 1. If a father runs three administrations, whether tutelages or curatorships, his son will not be called upon. This is laid down by the deified Severus and Antoninus. And so in the reverse case, the son's tutelages are credited to the father and exempt him. Similarly, for those they hold together, that is, one tutelage by the son and two by the father or vice versa. This applies to the total borne by a joint household; and so the most excellent Ulpian writes.

5 ULPIAN, *Duties of the Tutelary Praetor, sole book:* Three administrations in one household are sufficient. So if someone's father or son or brother in the same power has three administrations and the responsibility falls on their father because they are administered with his consent, in all these cases an exemption from tutelage exists. If they are not administered with the father's consent, however, it is frequently provided in rescripts that they do not count.

6 MODESTINUS, *Excuses, book 2:* If two further tutelages are proposed for someone who already has two, then the third serves to avoid the fourth, even if the emperor proposed the fourth, or the third, if he were proposed to the other before the emperor's proposal were known. If the order is not apparent and both are proposed on the same day in separate documents, the choice of which is to be undertaken lies with the proposer not the proposed. 1. Grammarians, teachers of rhetoric, and doctors who

are known as general practitioners are exempt from tutelage and curatorship just as from other public duties. 2. Further, there are in every city a fixed number who are exempt from public duties, the selection of which is limited by law. This appears from a letter of Antoninus Pius written to the province of Asia, but of universal application, the main provision of which is as follows: "Lesser cities can have five doctors immune from public duties, three teachers, and the same number of grammarians. Larger cities seven medical men and four of both types of teacher. The largest cities ten doctors and five rhetoricians and a similar number of grammarians. Beyond this number even the greatest city is not granted immunity." Probably the largest class includes the capitals of provinces, the second cities with law courts, and the third the rest. 3. This total cannot be exceeded either by a decision of the city council or in any other way. It may be reduced, however, since this will result in a benefit to the public service. 4. This exemption from public duties can only be enjoyed by someone included in the number exempted by a decree of the city council and so long as he is diligent in his work. 5. Paul writes that philosophers are exempt from tutelage in these words: "Philosophers, teachers of rhetoric, and grammarians who teach the young publicly are exempt from tutelage." 6. Ulpian, in the fourth book of his *Duties of Proconsul*, writes as follows: "Our emperor and his father wrote in a rescript to Laelius Bassus that a doctor can be struck off by a city council although he was previously admitted." 7. The same *constitutio* of Pius says this about philosophers: "The number of philosophers was not fixed since those who study philosophy are few. I suppose the very wealthy will voluntarily give the benefits of their studies to their countries, but if they direct their arguments to their own ends, they will immediately be revealed not to be philosophers." 8. An extract from a rescript of Antoninus Pius, quoted in a *constitutio* of the Emperor Commodus, shows that philosophers have immunity from tutelages. The actual words are as follows: "In all those cases my deified father, immediately he had achieved the purple, confirmed in a *constitutio* all existing offices and immunities, providing that philosophers, rhetoricians, grammarians, and doctors were to be immune from the function of gymnasiarch, aedile, chief priest, billeting soldiers, corn buying or oil buying, nor were they to be adjudicators nor ambassadors nor compulsorily enlisted in military service nor forced into other provincial duties nor anything else." 9. It must be borne in mind that someone teaching or practicing medicine has immunity in their own country only; if someone from Comana is a professor or doctor or teacher in NeoCaesarea, he will not be immune in Comana. And this is provided by the deified Severus and Antoninus. 10. But even beyond the permitted number, the very learned who live in another city are to be immune according to Paul, who says that the deified Antoninus Pius so provided. 11. The deified Severus and Antoninus provided exemption for professors teaching in Rome, whether salaried or not, as if they were in their own country. The reason for this provision is that since the imperial city is reckoned to be common to all, one who is useful there will earn exemption just as if he were in his own country. 12. Law teachers teaching in the provinces do not have exemption, but those teaching in Rome are exempt. 13. Ulpian writes in his sole book on the *Duties of the Tutelary Praetor*: "Athletes have exemption from tutelage if they have won a prize in the sacred games." 14. Provincial chief priesthoods, those of Asia, Bithynia, and Cappadocia, confer exemption from

tutelage, that is, so long as they are held. 15. Tutelage is neither a public nor a remunerated *munus*, but a private one; nor is it considered a provincial *munus* to administer a tutelage. 16. Municipal magistrates are also excused from tutelage and curatorship. 17. A deadly enmity conceived by the person appointed toward the father of the person orphaned provides an excuse from tutelage, apart from a tutor appointed by a provision in a will, unless the deadly hatred arose between them after the will was made or, although the hatred preceded the will, it was considered a good move to appoint him to the tutelage so that he would be loaded with its burdens and administrative cares. This appears from a rescript of the Emperor Severus. 18. Further, whenever someone raises the issue of the status of the *pupillus* and it appears that he is doing this not from base motives but in good faith, this affords exemption. This was laid down by the deified Marcus and Varus. 19. Paul writes about peasants, those of humble status, and the illiterate as follows: "Being of mean status and born on the land sometimes provides an excuse according to rescripts of the deified Hadrian and Antoninus. An excuse ought not to be accepted from someone who says that he is illiterate unless he be ignorant of business affairs."

7 ULPIAN, *Excuses, sole book:* Poverty rightly gives exemption if someone can prove himself unable to meet the burden and this is in a rescript of the deified brothers.

8 MODESTINUS, *Excuses, book 3:* Former soldiers who honorably completed their time with the colors have exemption from tutelage with respect to all civilians. As regards the children of their former comrades in arms, or of all former soldiers, they have exemption within one year of their discharge, but not beyond that year; for the principle of military equality was thought to be stronger than the privileges of the veterans, so long as they do not have other claims to be released from tutelage, such as their age or the like which can be used also as regards civilians. This applies to the sons but not to the grandsons of veterans; grandsons are taken to be in the position of other civilians. 1. Those who are dishonorably discharged are not held to have been soldiers and so neither have the privilege themselves nor will veterans be considered to have been appointed tutors to their children. 2. Sometimes those who have not fulfilled the period of military service have exemption from tutelage similarly to those who have completed it. For someone who has completed his twentieth year of service is taken to be similar to one who has completed the full period. 3. Someone who is discharged within the period does not have exemption from tutelage permanently but only for a set time, just as he has exemption from other public duties. Someone discharged from the army within five years can claim no exemption; beyond five years he has exemption for a year; beyond eight, two years; beyond twelve, three; beyond sixteen, four; and beyond twenty, he will be free permanently as we said above. 4. Those who have served in the nightwatch in Rome are exempt for one year only. 5. These all have exemption if they are discharged honorably, as has been said, or were inva-

lided out on account of ill health (so long as this is honorable). For if they receive a dishonorable discharge, they do not have exemption. 6. A fellow veteran is taken to mean not just a legionary but anyone at all who has been a soldier and was honorably discharged. A legionary can be appointed tutor to the children of someone who served in the nightwatch. 7. Further, a former soldier can be appointed as curator to a *minor* who is a soldier if, of course, his father has died, but also if he were freed from power. 8. There are *constitutiones* which provide evidence for all this. 9. Ulpian wrote as follows: "Those discharged dishonorably are obviously exempt from tutelages in Rome because they are not allowed to enter the city. Clearly, if someone has served in the city guard, although he was discharged before the completion of twenty years, nevertheless, he has a permanent exemption from tutelage. 10. Are veterans to take on one tutelage once for all or just one at a time so that having completed one tutelage, they are to administer again? Just as, for civilians, a tutelage which is finished does not benefit those who administer others and is not counted in the three, so neither does it benefit veterans to have been appointed. This was also provided in the case of curatorship as a sacred *constitutio* of Severus and Antoninus makes clear. 12. Chief centurions have by imperial *constitutiones* exemption from tutelage of anybody else; they are to be tutors to the sons of other chief centurions. Those are taken to be chief centurions who have actually held that office; if someone died without having held it, a chief centurion would not be tutor to his children.

9 ULPIAN, *Duties of the Tutelary Praetor, sole book:* A tribune who has served in the praetorian guard will be exempt even from the tutelage of his colleagues' children through the beneficence of the deified Severus and our emperor.

10 MODESTINUS, *Excuses, book 3:* Not only foot soldiers and other serving soldiers (such as chief centurions) but also any who have given useful service abroad to the Roman people have exemption for one year on their return. 1. Indeed, this year is given not just to those who have completed the usual period of military service on other public service but also to those who have in any way discharged public duties and return, although they spend less time than was appointed. 2. Certainly, those who held tutelages previously and laid them aside because of their absence abroad on public business immediately resume them on their return and the year is of no help to them; for the year is available as regards new tutelages in the future not those which one is already obliged to take up. 3. The year will be reckoned in consecutive days from the time when he returned via the most direct route or at least the route he would have taken without a detour. 4. That tutors appointed by will can properly apply for exemption from the administration of properties lying in another province is shown by the following *constitutio* of the deified Severus. "The deified Emperors Severus and Antoninus to Valerius. As a tutor appointed by will, you must appear and apply to be released from the administration of property lying in another province within the prescribed time." 5. If a chief centurion who has retired and undertaken the tutelage of a colleague's son is recalled out of military necessity, the burden of tutelage is resigned. 6. In similar fashion, a curator will be appointed in place of a tutor who is subsequently called upon by somebody to be an assessor with him. This is

stated in a *constitutio* of the deified Severus which properly applies to all similar cases; curators are to be appointed to take the place of all those temporarily absent. 7. If an adolescent freedman were appointed by his patron tutor to his children, or indeed anyone else who is at the time under twenty-five, he will not be concerned in the business so long as he is an adolescent, because someone else will administer it as guardian. So also the statutory tutor, if he happens to be adolescent will have a guardian appointed in his place in the meanwhile. 8. If someone is ill but not so that it is necessary for him to be altogether released from the tutelage, a curator will be appointed in his place. On his recovery, he will resume the tutelage. If someone goes mad, the same applies. Ulpian writes, ill-health also provides an excuse but, as our emperor and his father provided in a rescript, only that which prevents someone's managing his own affairs.

11 PAUL, *Tutorial Excuses, sole book:* Not only that they should not begin to administer but also that they should be excused from one already undertaken.

12 MODESTINUS, *Excuses, book 3:* The same Ulpian writes: "The rescript added in order to settle whether the exemption is for a period or permanent that this depends upon the nature of the illness and how serious it is. A mad fit indeed does not completely excuse but results in the appointment of a curator in the meantime." 1. There are others who are permanently released from administration even if they have already become tutors or curators, such as those who have happened to change their place of residence elsewhere by the emperor's order, in the knowledge that he is a tutor and expressly granting him a change of residence, both being indicated in the rescript.

13 MODESTINUS, *Excuses, book 4:* It should be noted that neither appointed nor testamentary tutors need to appeal; this is provided in a *constitutio* of the deified Severus and Antoninus. This ought to apply also to those appointed curator; for there is little difference between curator and tutors. But against decisions rejecting their pleas of exemption, they have a right to be heard. 1. There are many formalities to be observed by tutors or curators who wish to present grounds of exemption. They must have presented themselves in court in good time. These are the time limits: Someone living in the same city where he is appointed or within a hundred miles of it must excuse himself within fifty days; after this time, his plea will not be accepted, and he will have to undertake the administration. If he has done nothing, he will be in the same position in which he would have been if he decided on his own account to cease administering, leaving himself no way in which he might be excused. Someone who is abroad more than a hundred miles from the city will have a day allowed for every twenty miles, starting from the time he finds out (for the magistrates must inform him either in person or at his house) and besides this another thirty days for the preparation and presentation of his case. This also applies to those appointed by will, both tutors and those curators who are customarily confirmed by the governor. 2. We find something about this worth noting in a *constitutio* of Marcus. The legislator gave a period of fifty days to someone who was in the same city in which he is appointed or within a hundred miles of it; for someone living beyond a hundred miles he ordered that a day should be added for every twenty miles and moreover thirty days for the presentation of the case. It follows from this that for someone living a hundred and sixty miles away, the period is thirty-eight days; eight for the hundred and sixty miles, twenty miles being counted for each day, and thirty days for the legal presentation. Someone who is living at a distance, therefore, will be in a worse position than someone living within a hundred miles or in the city itself, since a fifty-day period is always allowed to the latter, to the former less. But if a literal reading of the legislation produces this meaning, nevertheless, the legislator intended a different meaning. So Cervidius Scaevola, Paul, and Domitius Ulpianus, leaders among the jurists, write, saying that it must be

so interpreted that a period less than fifty days is never to apply, but a longer period whenever the total of the days attributed to the journey added to the thirty days which the law provides for the presentation of the suit exceeds fifty days; for example, if say someone lives four hundred and forty miles away, he will have twenty-two days for the journey added to the thirty for the presentation of the suit. 3. This time limit is to be observed by all who wish to exempt themselves from tutelage or care, wholly or partially. 4. Consequently, it can be taken that no one will be heard, although he has some ground for exemption, if he does not observe the time limit; unless he is a citizen of some other city. 5. It is so necessary to observe the time limit that not even one who would have been exempted after the hearing will be released, according to a rescript of the deified Severus and Antoninus in which they declared that someone appointed in such a person's place could not validly be appointed in place of someone who was in fact tutor. 6. It is sufficient to apply within the time limit; if he were subsequently unwillingly absent, he will not be summarily dismissed. But if he appeared only for form's sake and did not continue the suit thereafter, he will be dismissed after the time has run; this is provided by a *constitutio* of the Emperors Severus and Antoninus. 7. If someone cannot appear in time because of illness or another misfortune, for example, of the sea or of the weather, or highway robbery or something similar, he can obtain a respite for which it would be sufficient to cite the law of nature, were it not also provided in a *constitutio* of the Emperors Severus and Antoninus. 8. It should be noted that it is not enough to have appeared in court, but one must produce evidence of the type of excuse and if there are many grounds of exemption, mention them all. If this is not done, he who appears but does not mention the ground of exemption is like one who does not even appear. 9. The fifty consecutive days are reckoned to run from the moment of notice when he learned that he had been appointed. 10. Evidence should be given in court or recorded officially in another way; it can also be given extrajudicially by affidavit, as the emperors themselves provide. 11. The above refers to those who have to observe the time limit; we must now consider those not subject to a time limit. 12. Tutors appointed contrary to law, that is, those appointed either by someone by whom they ought not to be appointed or who ought not to be appointed or for someone to whom they ought not to be appointed or in a way in which they ought not to be appointed, who are not confirmed in office and who do not take on the administration, are not accountable, and it is not held against them that they did not observe the time limit for an application for exemption; for they have no need to exempt themselves as is shown by the following *constitutiones* which I add as illustrations as they are of general application. "The deified Emperors Severus and Antoninus to Narcissus. As you have been appointed tutor by your maternal grandfather, you do not need to be excused since you cannot legally be held to it. So long as you have not interfered in the administration, you will be safe." Similarly, if a magistrate appointed someone not subject to his jurisdiction tutor or curator, he does not need to observe the time limit if he is neither citizen nor resident.

14 MODESTINUS, *Excuses, book 5:* It should be known that in works on the excuses of tutelage and curatorship, "freedmen" must be understood to refer to the mother as well as the father of the *pupillus*. 1. Similarly, whenever we refer to a patron's children, we must be understood to refer by this term not just to the first generation, that is, son and daughter, but also to their descendants, and so on. 2. Even if someone has acquired the right to wear a golden ring, yet he retains the rank of freedman in this regard; on this the deified Antoninus the Great issued a rescript. 3. Someone who was purchased and manumitted at his own expense can in no wise be compared to other freedmen. 4. If a slave were manumitted by several persons and he be appointed tutor to the children of all of them, he will not be exempted on the basis of three tutelages.

15 MODESTINUS, *Excuses, book 6:* A eunuch is appointed tutor; he has no excuse, as a *constitutio* of the Emperors Severus and Antoninus shows. 1. Someone who promised a father that he would be tutor to his children cannot be excused from this tutelage, even though otherwise he would have a good ground of exemption. 2. It should be noted that social position furnishes no exemption. So someone who is a senator will be guardian to senators of inferior rank as the deified Marcus and Commodus provided. 3. If someone not of senatorial rank is made tutor or curator to someone of nonsenatorial or similar rank and then afterward becomes a senator, he is obviously released from the tutelage. But if those in his tutelage or care are a senator's children, he will not be released from the tutelage. 4. Similarly, someone of lower social rank will not be excused from being tutor or curator to someone of higher rank. 5. The sacred *constitutiones* provide that neither secretaries nor accountants, who are called counters, have an exemption. 6. Jews are to be tutors to non-Jews just as they undertake all other public duties; for *constitutiones* provide only that they are not to be troubled with matters which appear to be defiling to their religion. 7. Being in charge of a city's accounts does not even count as one tutelage. 8. The freedmen of women of senatorial rank, even if they manage their affairs, are not exempted from tutelages; for this is only conceded to the freedmen of male senatorials. 9. If a city magistrate, that is, the governor, becomes liable for a tutelage because it lies with him to make appointments, he cannot count this as an ordinary tutelage; neither can a guarantor for tutelage nor those appointed as honorary tutors. 10. One who farms a city's taxes is not exempted from tutelage. 11. Can someone who says he has a number of grounds, none of them strong enough by itself, be exempted? That is, although not seventy nor having three tutelages nor five children nor other grounds of exemption, he says he has two tutelages, two children, and sixty years of age, or some other similar ground, which individually do not provide assistance but together offer some grounds. But it was agreed that this does not exempt. 12. Someone who has exemption from city or public duties is not therefore excused from tutelage. 13. One who is exempted from tutelage or curatorship is by no means exempted from other appointments in the future unless he has grounds for exemption. 14. Someone who claims that he does not know the father or mother of the *pupillus* is not exempted on that ground. 15. Sometimes someone who has three tutelages or curatorships does not have a right of exemption, for example, if he has made an effort to obtain the most recent; for it appears that one becoming tutor to someone of lower rank can have striven for it. 16. Ulpian, in his sole book *Excuses*, writes as follows: "If someone administers the tutelage of his own emancipated son among his three tutelages, I know that it is doubted whether this counts toward the total." I find a rescript, however, that the tutelage of an emancipated daughter should be counted in the total. 17. If someone is appointed tutor while in his father's power and his father is unwilling to stand guarantor for him, the law orders the father himself to be appointed tutor and that the insuring of the tutelage should not be avoided. The rescript of the deified Hadrian says: "The Emperor Hadrian to Vitrasius Pollio, Governor of Lyons. If Clodius Macer is thought suitable to be a tutor, although he is a son-in-power, but his father is unwilling to stand guarantor for him in order to release his son from the tutelage and persists in this knavery, I think it proper for you to counteract this fraudulent conduct and that they should both, son and father, be compelled to administer the tutelage of Clement's children."

16 MODESTINUS, *Replies, book 2:* Gaius appointed Nigidius as tutor to his son by will and also made him curator until his son was twenty-five. Since Nigidius can claim exemption from the curatorship without a hearing, from what date is the period to run which the deified Marcus ordered to be observed as regards exemption? From the day the will is opened or from the time when he is required to act, that is, on the completion of the fourteenth year of the *pupillus*? Modestinus replied that an exemption from the curatorship is needed at the time when the curator was confirmed in his office by the order of the praetor or governor.

17 CALLISTRATUS, *Judicial Examinations, book 4:* As regards the assumption of tutelage by one who is already administering three tutelages, not only the size of the property is to be taken into account but also the age of the *pupilli* is to be considered; for if the age of the first *pupilli* or of those whose tutelage he is now required to undertake is near to puberty so that there is only six months to run, he will not be excused. This is laid down by imperial *constitutiones*. 1. The inhabitants of Troy, who, because of the celebrated fame of the city and its connection with the origins of Rome, have long since been granted the fullest immunities both by *senatus consulta* and by imperial *constitutiones*, have an exemption from tutelage as regards *pupilli* who are not Trojans; this was provided by the deified Pius. 2. We say that those who are in craft unions, for example, smiths, have an immunity as regards the administration of tutelage of persons outside the union; they have the exemption unless their private resources have increased with the result that they are required to perform other public duties also; this is laid down in imperial *constitutiones*. 3. Not all unions and guilds, however, have this dispensation from tutelages despite the fact that they are free of local *munera*, unless the privilege is expressly granted them. 4. Someone serving as aedile can be appointed tutor, although the aedileship is one of those magistratures which provide exemption from private *munera*, according to a rescript of the deified Marcus. 5. It should be noted that inasmuch as those holding a public office are granted a dispensation from tutelage, only those are dispensed who are then required to take up the tutelage for the first time; it must also be noted that those others who have already begun the administration are not dispensed either during the period of their magistracy. 6. Shipowners do not appear to have a dispensation from tutelage among their privileges, so the deified Trajan replied in a rescript. 7. Army camp followers are usually excused from tutelages except as regards those who are themselves camp followers from the same fort and of the same way of life.

18 ULPIAN, *Lex Julia et Papia, book 20:* Those who are lost in war can assist in exemption from tutelage. It is a question, however, who are to count as such, whether just those who have been killed in battle or indeed all who have been taken from their families by reason of war, for example, in a siege. It is consequently preferable that only those who are lost in battle ought to count, whatever their age or sex; for these fell for their country.

19 ULPIAN, *Edict, book 35:* It is commonplace that the administration of provincial property is remitted to those who live in Italy.

20 JULIAN, *Digest, book 20:* If an uncle argues that the *pupillus* has been disinherited and that he himself was made heir, it is proper that the uncle should receive an exemption and, if the uncle does not ask for exemption, he should be removed from the tutelage and a tutor appointed for the *pupillus* in order to proceed with the inheritance suit.

21 MARCIAN, *Institutes, book 2:* One cannot excuse oneself from tutelage on the ground that one has a lawsuit with the *pupillus*, unless perhaps the whole estate or most of it is in issue. 1. Someone who wishes to excuse himself and has a number of grounds, some of which he has not proved, is not prevented from using the others while they apply. 2. Although an appointed tutor is appointed to the whole of the property, nevertheless, he may excuse himself from administering the tutelage beyond a hundred miles, unless the property of the *pupillus* is all in the same province;

so provincial governors appoint tutors for those matters within their province. 3. Nor may senators be required to administer a tutelage more than a hundred miles from the city. 4. A tutor may be appointed therefore for one who already has a tutor, but he is appointed in respect of different property, not the same.

22 SCAEVOLA, *Rules, book 1:* Surveyors are not dispensed from tutelages. 1. But those whom the emperor has charged with some other business are exempted from tutelage so long as they are discharging that business.

23 ULPIAN, *Replies, book 2:* I replied that one did not have an exemption from tutelage on account of a magistracy about to be taken up in a municipality. 1. If those serving in forts are appointed tutor by someone other than one who himself serves in forts, I replied that they had exemption.

24 PAPINIAN, *Questions, book 11:* It is on no account to be believed that the privilege of exemption is lost to those who have been given liberty under *fideicommissum*; for in nearly all cases such a manumitter obtains no rights of patronage over the person of the freedman except that he ought not to summon his patron to court without the praetor's order.

25 ULPIAN, *Duties of Proconsul, book 2:* A tutor cannot excuse himself by petition.

26 PAUL, *Excuses, sole book:* That quartermasters of provision have a right of exemption appears from a rescript of the deified Marcus and Commodus sent to the prefect of the corn supply.

27 MARCIAN, *Rules, book 5:* A legatee who is required to hand over the whole legacy to another, if he prefers to excuse himself from the tutelage, obtains the legacy on account of the fideicommissary; the case is similar to that of one who sued for deception but did not win.

28 PAPINIAN, *Replies, book 5:* A tutor asked before the day of the decision whether he seeks any exemption will rightly be unable to prevent the application once commenced. 1. It is settled that anything left in trust by a parent for the renumeration of tutors, after their exemption, may be retained even by heirs outside the family. This does not apply in the case of a son whom a father appointed tutor and co-heir to his *impubes* brother; for he won his father's favor as son not as tutor. 2. A tutor ordered into exile for a time should not be exempted, but a curator should be appointed in his place for the duration of his banishment.

29 MARCIAN, *Institutes, book 2:* Clearly, if a tutor were sent into exile, he can excuse himself if his banishment is perpetual. 1. The ignorance of an exile will more readily have indulgence because he is unable to accuse his fellow tutor of untrustworthiness.

30 PAPINIAN, *Replies, book 5:* The best and greatest emperors provided that jurisconsults who commenced the administration of a tutelage while assisting the imperial council be excused, since they were in attendance about their person; and the honor so conferred had not a certain limit of time or place. 1. Someone born in the provinces lived in Rome and his curator, appointed by the order of both praetor and governor, undertook the administration of affairs in both places. It is settled that he is not considered to administer two curatorships because clearly two inheritances cannot be constructed out of one. 2. Someone protected by privilege cannot be required to assume the care of his brother. 3. A patron appointed certain of his freedmen by will tutors and curators for a freed *impubes*. Although they were thought suitable, nevertheless, they can be exempted at public law so that they are not confirmed by decree.

31 PAUL, *Questions, book 6:* If someone who was administering three tutelages has

been appointed to two further *pupilli* by several decrees from which he could excuse himself, but before he could advance the grounds of exemption, one of the *pupilli* whose tutelage he was administering died, with the result that he lost his claim to exemption, he was immediately liable for the one in the first decree as though taking on the fourth in place of the third tutelage; for one is automatically tutor until exemption. Thereafter he could be excused from the tutelage of the one who is now in fourth place, but as he has not been excused, necessarily the burden of the latter tutelage must be borne also. Nor does it bother me that someone says we should examine whether the tutelage is actually administered or not; for it is only relevant that the tutelage be unfinished; for the rest, if he bears the risk of ceasing to administer, I consider that the tutelage should be reckoned to be his. 1. The same can happen if a tutor who already has three tutelages has been appointed in two wills. If one wants to know which tutelage has been conferred first, the relevant moment is not the time when the wills were read but when the heirs entered or the conditions therefor were fulfilled. 2. There will be this difference between the two tutelages we are discussing; if a third and fourth are conferred, then, although he took on the fourth first because he was ordered to administer the latter, that is, the fourth, he bears the risk of the former to which he was appointed. 3. I thought that someone who prevented a *pupillus* from using his father's property should be left with a fourth tutelage on the ground that he had already resigned the other one. 4. In other cases, I would have thought that the praetor was acting properly if he believed that one tutelage was sufficient if it were so extensive and troublesome that it counts as several. But brothers living together are not on that account to be taken as several nor yet brothers who share the same inheritance if a common account is rendered of the administration. Conversely, brothers with a divided inheritance make up two tutelages; for as I said, it is not the number of *pupilli*, but the difficulty of reckoning and rendering accounts that is to be considered.

32 PAUL, *Questions, book 7:* Nesennius Apollinaris to Julius Paulus. A mother appointed her son her heir while a *pupillus*, or some other stranger appointed an outsider heir while a *pupillus* and gave a legacy to Titius and appointed him tutor to the *pupillus*. Once he had been confirmed, Titius excused himself from the tutelage; does he lose the legacy? Further, if someone who was not appointed tutor in the will but took a legacy and was appointed tutor by the praetor excuses himself, is he too to be denied the legacy? Would it make any difference if the tutor had been appointed by the father or to an emancipated *pupillus* or if as curator to a *pubes*? I replied that when someone improperly appointed tutor or curator by the father and confirmed by the praetor prefers to take advantage of an exemption, he will be denied the legacy, and this was the opinion of our Scaevola; for the praetor in confirming him as tutor simply follows the choice of the deceased. The same applies to the mother's will. Similar to the mother's case is that of any stranger who institutes a *pupillus* heir and in appointing a tutor wishes to make provision, just as with our own pupils. It was rightly decided, therefore, that someone who rejects the obligation imposed upon him by the testator but sought what he gave should be denied. I do not think that those who decline the burden of tutelage should always be refused legacies but only if the legacy seems to have been given together with the tutelage of the offspring, not if it would have been given anyway even without the tutelage. This can be the case if you inserted the gift of a legacy in a will and the tutor was appointed in subsequent codicils; for here it is not possible to say that the legacy was left him because the testator wished him to be tutor also.

33 PAUL, *Questions, book 23:* But too much particularity is not to be expected unless clearly the father announced that he wished to make the gift even if the other would not administer the tutelage; for in all cases, the legacy must either precede or follow the tutelage.

34 PAUL, *Questions, book 7:* From this it appears that this is different from the case of

someone whom the praetor appointed tutor, although he could make use of an exemption, since here he does nothing against the testator's wish. He cannot say that he wanted someone whom he did not appoint tutor to administer his son's tutelage.

35 PAUL, *Questions, book 23:* What, then, if he did not excuse himself, but was satisfied with refusing to administer on the ground that there were others more suitable? He could be sued if the property could not be protected by them. But this should not be a ground of proceedings; rather his contemptuous behavior in excusing himself in such a way should be punished. One would say he was all the more unworthy of a father's choice who has been removed from tutelage as untrustworthy.

36 PAUL, *Replies, book 9:* Parents usually choose tutors for their children from among their most faithful friends and then urge them to take on the burden of tutelage by rewarding them with a legacy. But as you say that the subject acquired a legacy by will and was substituted to the *pupillus*, it is unlikely that the testator would have wanted him to be substituted if he had also taken up the tutelage; so the subject could indeed be denied the legacy, if the *pupillus* were still alive, but he cannot be removed from the substitution since in this event, even if he had undertaken the tutelage, it would have come to an end. 1. Lucius Titius had among his three surviving sons one who was emancipated but of an age that he required curators. If Titius the father is appointed curator by the praetor on the application of his emancipated son, can he take advantage of the rule of public law and claim an exemption by virtue of his three sons? I replied that this advantage ought not indeed to be denied to the father who claims it on account of his numerous children; but when he is asked for as curator by his own son, he kicks against all natural instincts if he is tempted to use such an excuse.

37 SCAEVOLA, *Replies, book 2:* Someone who had been appointed tutor by will claimed before the praetor that he had three children and added that as the *pupillus* had an uncle who was statutory tutor, he had been improperly appointed tutor. The praetor decided as follows: "If you were appointed tutor to someone who had a statutory tutor, you do not need an exemption." As there was in fact no uncle who could be tutor to the *impubes*, does the tutor continue in office? I replied on the basis of the facts stated that although he had good grounds for exemption, he should not be excused because of his wrongful statement. 1. Further, if he were satisfied with the decision and did not undertake the tutelage, should an *actio utilis* be available against him on this basis? I replied that if he ceased to administer by mistake (believing himself excused in right of his three children as he claimed) rather than deliberately, an *actio utilis* ought not to lie.

38 PAUL, *Views, book 2:* Fifty days only are allowed for bringing suits for exemption, but for the completion of the proceedings, four months are available running from the day of appointment.

39 TRYPHONINUS, *Disputations, book 13:* If, although he arranged to offer an excuse, he was prevented by a delay in the objections from obtaining a release by decree, the excuse may properly be established.

40 PAUL, *Views, book 2:* Someone who becomes blind, deaf, mute, mad, or chronically sick after taking on a tutelage can resign it. 1. Usually, poverty which is unequal to the task and burdens of tutelage is accepted as an excuse.

41 HERMOGENIAN, *Epitome of Law, book 2:* The administrators of the emperors' property are by grace exempted from tutelage and similarly from curatorships conferred during their period of office, although this is not expressed in writing. 1. The same goes for those who exercise the functions of prefect of the grain supply or of the city guard. 2. Companions up to the permitted maximum of those who are about on state business are exempted from a tutelage conferred while they are away or just about to leave; but they cannot resign one taken on previously. 3. Those who belong to a guild which exempts them in right of the guild are not exempted from tutelage of their fellow guildsmen and their children, excepting those to whom this is expressly granted.

42 PAUL, *Judicial Examinations, sole book:* Obviously, they cannot be required to undertake the tutelage of their fellow members' children beyond a hundred miles from the city.

43 HERMOGENIAN, *Epitome of the Law, book 2:* A senator's freedman who is tutor to the senator's children is not exempted from other tutelages.

44 TRYPHONINUS, *Disputations, book 2:* Since by virtue of the legislative speech of the deified Marcus a freeman appointed tutor to a freedman should be excused, the emperor together with the deified Severus his father provided by rescript that the same exemption was available to someone who had obtained the right to wear rings. 1. It follows that if a freeborn tutor or curator is appointed to a freedman *pupillus* who has the right to wear rings, the exemption on the grounds of difference in rank will not be available. 2. So if Lucius Titius, who was appointed to a *pupillus* or *pubes* under the age of twenty-five before he gained the right to wear rings, was excused on the grounds of his free birth, after the privilege has been obtained he can be appointed tutor or curator anew on the analogy of the person about whom it was agreed and decided by rescript that for the period of a year from when he ceased to be abroad on state business, he was excused but that once that was over he could be appointed in his own stead. 3. Although a freedman who administers his senatorial patron's affairs is exempted from the tutelage of others, someone who has obtained the right to wear rings and who passes into the ranks of the freeborn cannot take advantage of this exemption.

45 TRYPHONINUS, *Disputations, book 13:* "Let Titius be tutor to my children so long as he does not go away on state business." Titius undertook the tutelage conferred by the will and then commenced a period of absence on state business and returned. Ought he to be exempted as if a new tutelage had now been conferred on account of his absence on state business, or should he not be exempted because the will took effect before the absence on state business and the tutelage had already been administered? What if, in the meantime, he has produced children or acquired some other ground of exemption? The better view is that there is only one tutelage here, and so neither exemption helps him, nor can he be sued in the action on tutelage in respect of the former period. 1. But if the entry in the will had been within as follows, "let Titius be tutor; when he goes away on state business, let him not be tutor; when he returns, let him be tutor," we must see what should be said about exemption either on the basis of absence on state business or another ground arising subsequently. But another question arises first, whether tutors appointed by will under time or other conditions need to excuse themselves before the time or other condition occurs and particularly whether the fifty-day period within which one must exercise rights of exemption begins to run against them. It is true that one is not tutor until a time condition matures, and the same goes for an inheritance before entry. Therefore, because in the case of the former will the tutelage had already been undertaken he who was excused as being about to be absent elsewhere on state business on his return immediately takes up the tutelage even during the year; in the latter case, he ceased to be tutor by virtue of the will itself and therefore can excuse himself from the second tutelage. 2. If someone is appointed curator by the praetor to a lunatic or a dumb person or an unborn child, he can be excused on the grounds of having children. 3. We should accept as tutors appointed in Rome only those who are appointed by the urban prefect or by the praetor or by a will written in Rome or in the suburbs. 4. If a freedman is prevented from doing business by his state of health of mind or body so that he cannot even manage his own affairs, one must yield to necessity in case the burden of tutelage laid on the freedman becomes impossible and cannot be discharged except at the inconvenience of the *pupillus* and against his best interests.

46 PAUL, *Judicial Examinations, sole book:* Those belonging to the bakers' guild are exempt from tutelage so long as they run the bakery themselves, but I do not think that those who are not among their number are exempt. 1. Bakers in the city are even exempt from tutelage of their fellow members' children. 2. There is a further kind of exemption if someone alleges that he does not have a residence in the place where he is appointed to a tutelage; and the Emperor Antoninus together with his deified father indicated as much.

2

WHERE THE *PUPILLUS* OUGHT TO BE BROUGHT UP AND RESIDE AND THE PROVISION OF MAINTENANCE FOR HIM

1 ULPIAN, *Edict, book 34:* The praetor is accustomed to being approached quite often to decide where children are to be fed or maintained, not only in the case of those born posthumously but of all children. 1. He usually decides whether someone ought to be better maintained by reference to the individual, his situation, and the circumstances; and sometimes the praetor overrides the father's instructions. Indeed, when someone provided in his will that his son should be brought up in the substitute heir's house, the Emperor Severus laid down in a rescript that the praetor should consider the matter in the presence of the children's other relatives; for the praetor should act so that the offspring are maintained and brought up without suspicions of the sinister. 2. Although the praetor does not promise to compel someone who refuses to bring someone else up in his house, yet it is questionable whether he ought not to compel the unwilling, for example, a freedman, an ascendant, or some other relative, or kinsman. The better view is that on occasion he ought to do this. 3. It is obviously not wrong to say that a legatee or heir who declines to rear as the will provides should be denied the action on the analogy of a tutor appointed by will, but this is only accepted if he was left something on that understanding; if he would have been left it anyway, although it was known that the rearing would be declined, the action will not be denied him; and so the deified Severus frequently laid down.

2 ULPIAN, *Edict, book 36:* The jurisdiction of a judge who examines a case of tutelage allows him to accept the reasonable accounts of a tutor as, for example, if he says that he has expended sums in feeding the *pupillus* or in education. 1. If indeed the praetor has established a standard, the judge should be bound by what the praetor has laid down; but if the praetor has not considered the matter, the judge must decide the standard himself in the light of the resources of the *pupillus*; for the tutor may not recover all that he spent, if he spent more than was reasonable. 2. This is the more so if the praetor has laid down a standard of maintenance; for if what has been decided is beyond the means of the resources of the *pupillus* and he has not informed the praetor about the state of the resources, he ought not to account for all he provides because, if he had informed the praetor, either the limits decreed would have been reduced or they would not have been fixed at such a level. 3. But if a father lays down standards of provision for children whom he has instituted heirs, the tutor ought to account for what is provided unless indeed what was laid down was beyond the means of the resources; for then it will be charged to him because he did not apply to the praetor for a reduction in the standard of provision.

3 ULPIAN, *All Seats of Judgment, book 1:* The right of determining the level of provision for *pupilli* is the praetor's; he himself should fix what amount tutors or curators ought to expend on the provisions of their *pupilli* or adolescents. 1. He must take into account the size of the inheritance when he determines the provision, and he must provide reasonably so that the level of provision is not decided by the total income of the property but always so that some of the income remains over. 2. In making his decision he must bear in mind the slaves who look after the *pupilli*, the pocket-money of the *pupilli*, and their clothing and housing; their age also is to be borne in mind when the levels of provision are fixed. 3. In the case of very large inheritances, not the

whole of the property, but only what is enough for a frugal maintenance is taken as the measure of provision. 4. But if the tutor and the person wishing to have a measure of provision fixed cannot agree on the extent of the resources, the praetor must undertake an investigation and not fix the level of provision at random in case he fails to do justice to either side; he ought first to examine what is the amount available to the tutor on his own admission and to threaten that heavy interest will be charged on any amount which was in fact in his hands beyond the amount admitted. 5. Similarly, as regards the bringing up of *pupilli* or adolescents or *pupillae* or girls under twenty-one, the determination is usually made in the light of the resources and the ages of those who are to be brought up. 6. But if the *pupilli* are poor, the tutor is not required to provide for them out of his own pocket. If by chance a *pupillus* is reduced to poverty after the fixing of the amount of provision, what has been fixed must be reduced; similarly, it must be increased if the property is augmented in any way.

4 JULIAN, *Digest, book 21:* Someone who had instituted his son heir had left a legacy of two hundred to his daughter as dowry when she should marry but nothing else and appointed Sempronius as their tutor. The latter was brought before the magistrate by the relations and kinsmen of the *pupilla* and was ordered to make provision for the *pupilla* and to pay teachers on behalf of the *pupilla* so that she should be taught the liberal arts. When he was past puberty, the *pupillus* paid the legacy of two hundred to his sister who was already past puberty. The question was whether an action of tutelage would lie for what had been provided by the tutor out of the tutelary property as provision for the *pupilla* and as wages. I replied: I think that although the tutor provided for the sister of his *pupillus* and instructed her in the liberal arts without a magistrate's decree, as she could not otherwise receive these benefits, nothing ought to be paid to the *pupillus* or his substitute heir on that account in an action on tutelage.

5 ULPIAN, *Duties of Proconsul, book 3:* If there is a dispute as to where a *pupillus* should be maintained or brought up, this should be decided by the governor after an examination. In the examination, matters should be avoided which could embarrass the modesty of an *impubes*.

6 TRYPHONINUS, *Disputations, book 14:* If the *pupillus* needs provisions and the tutor is away, or if the tutor is charged with neglect and excessive idleness in his administration, if all this adds up to the fact that through the tutor's absence the affairs of the *pupillus* are abandoned and neglected, the praetor should call together the tutor's relations and friends and publish a decision, even in the tutor's absence, either removing him if he merits such disgrace or joining a curator; and whoever is appointed will make provision for the *pupillus*. If indeed the tutor is unavoidably and unexpectedly absent, for example, if he is suddenly called to the imperial council and he could neither provide for his own affairs nor take care of the *pupillus* but he is expected to return and is considered suitable, if he does not arrange for another to be joined and the *pupillus* requests provisions from his own property, it is right that someone should be appointed for the sole purpose of making provision out of the property of the *pupillus*.

3

THE ACTIONS ON TUTELAGE AND FOR LIQUIDATION OF ACCOUNTS AND THE *ACTIO UTILIS* FOR CURATORSHIP

1 ULPIAN, *Edict, book 36:* The tutor is called to account in this action for all that he has done which should not be done and for that which he has not done, answering for fraud, negligence, and the standard of care shown in his own affairs. 1. On this a question is put in the twenty-first book of Julian's *Digest*, whether, if a tutor authorizes his *pupillus* to make a gift in contemplation of death, he is liable in the action on tutelage. Julian says he will be liable; for, he says, just as *testamenti factio* is not granted to *pupilli*, no more are they to be permitted to make gifts in contemplation of

death. 2. But as he cannot make a gift in contemplation of death with his tutor's authorization, the same Julian wrote that many think that not even an ordinary gift is valid and frequently this is the case; but there can be some cases in which a tutor may correctly authorize the *pupillus* to diminish his property, that is, where a decree obtains. For example, if the tutor made provision for a mother or a sister who would otherwise be unable to look after themselves, since it is an action of good faith, no one, he said, either *pupillus* or his substitute heir sues when such closely linked persons are provided for; rather he thinks it possible on the contrary to sue a tutor in the action on tutelage if he omits to performing such a duty. 3. It is part of the tutor's duty to compile an account of his actions and render it to his *pupillus*; if, on the other hand, he has not done this or if he does not reveal what has been done, he will be liable for it in the action on tutelage. It is accepted that the questioning of slaves and even their examination under torture falls within the judge's competence. For the deified Severus laid down that when neither inventory nor catalogue of sales is produced, accounts should be produced by the slaves who managed the property and should be used instead. If the tutors allege that these accounts have been made up fraudulently by the slaves, the slaves may be examined even under torture. 4. Further, Labeo thinks that if the tutor makes provision for the mother of the *pupillus*, this can be charged; but it is more correct to say only if he gave in the case of extreme poverty can he charge it to the plentiful funds of the *pupillus*, in those cases, therefore, where it so happens that the mother is poor and the son in funds. 5. If he provided a wedding gift for the mother of the *pupillus*, Labeo wrote that he could not charge this to the *pupillus*; for such a gift is scarcely essential. 6. If a father appointed tutors for *pupilli* among whom there is a freedman of his own by whom he wished the tutelage to be administered and the tutors provided an amount of capital for him, because he was unable otherwise to maintain himself, Mela thinks that an account should be rendered of the sum provided. 7. So if a tutor was appointed after an inquiry into the state of the property and his fellow tutors assign provisions for him, he ought to render an account because there was a good reason for the grant. 8. If he provided food for slaves or freedmen, that is, for those dependent on the property of the *pupillus*, it is to be held accountable; similarly, where he provided for freemen, if a good reason for the provision exists. 9. Again the tutor can account for the cost of a lawsuit and for traveling expenses if he needs to travel around or go on a journey on business. 10. Now we shall deal, in cases where more than one administers the tutelage of a *pupillus* with the proportionate liability of each. 11. If all simultaneously manage the tutelage and all are solvent, the action rightly will be divided proportionately on the analogy of verbal guarantees. 12. But if they are not all solvent, the action is divided among those who are; though in as much as each is solvent, he can be sued. 13. If by chance one were condemned and paid for something done by another tutor or for something done by them all and the actions are not transferred to him, the deified Pius and our own emperor and his deified father provided that an *actio utilis* is to be given to the tutor against his fellow tutor. 14. Clearly, if one tutor was sued and paid for something done fraudulently by all, the actions are not to be assigned nor an *actio utilis* given, because he has paid the penalty for his own wrong doing, which makes it improper that he should receive anything from the other participants in the fraud; for there is no partnership in wrongdoing or equal sharing in the damages for wrongdoing.

15. Moreover, liability does not fall on the fellow tutors even if the fellow tutors be solvent, before it falls on the magistrates who appointed them or on their sureties; so our emperor provided in a rescript to Ulpius Proculus. As for what Marcellus wrote in the eighth book of his *Digest* and what is very often provided in rescripts, that so long as at least one of the tutors is worth suing, it is not possible to sue the magistrate who appointed; this is acceptable if the fellow tutor is not being sued on the basis that he has become untrustworthy or he did not wish to provide security. 16. It is agreed that this action lies against the tutor's heirs. 17. But it is equally available to the heirs of the *pupillus* and other similar persons. 18. A tutor can require actions against his fellow tutor on whose behalf he has been condemned to be transferred to him not only before but even after judgment. 19. In this action for liquidation of accounts, not only are those who are statutory tutors liable but all who are properly tutors and actually manage the tutelage. 20. It is a matter for consideration whether in this action only the value of the property is to be doubled or also an amount which represents the interest of the *pupillus*. And it seems better to me that the matter of interest does not come into account in this action but only what the thing is worth. 21. It is accepted that in tutelage two actions lie for one obligation, and so either there was an action on tutelage, and one cannot sue for liquidation of accounts or vice versa, and the action on tutelage was consumed to that extent. 22. However, Papinian says that a tutor who embezzled pupillary property will be liable for theft, and, if sued for theft, his having been sued in the action on tutelage for embezzlement will not release him from the action of theft. For the obligations in relation to theft and in relation to tutelage are not the same, which is to say that several actions can arise out of the same facts and several obligations. He is liable both for tutelage and theft. 23. It should be noted that this action is perpetual and is available to heirs and other similar persons for whatever was taken during the life of the *pupillus*; but it is not given against the heirs and other successors in title because it is penal. 24. This action is only available when the action on tutelage is, that is, not until the end of the tutelage.

2 PAUL, *Sabinus, book 8:* No one can be liable in the action for liquidation of accounts unless he embezzled some of the property of the *pupillus* while managing the tutelage. 1. If indeed he did it with the intention of stealing, he is liable for theft. He is liable in both actions and the one does not bar the other. But the *condictio* on the ground of theft also lies so, if the *pupillus* recovered what was taken in that way, this action is barred because the *pupillus* has lost nothing. 2. Although this action lies for double damages, it lies simply for recovery of the property; the penalty is not the whole doubled amount.

3 POMPONIUS, *Sabinus, book 5:* If an action is brought on tutelage or for unauthorized administration but it is unclear how much is owed to the tutor or procurator by his opponent, security is to be provided at the judge's discretion for what they have lost on that account.

4 PAUL, *Sabinus, book 8:* The actions on tutelage cannot be brought unless the tutelage has come to an end. It is ended not only by the *pupillus* attaining the age of puberty but also by the death of either tutor or *pupillus*. 1. Julian thinks that an emancipated son can be held liable directly if he administers a tutelage. 2. If one still *impubes* brings the action on tutelage, he loses nothing. 3. The action against the curators of lunatics is not on tutelage but for unauthorized administration, and this action is available while the curatorship is being administered because the same principle does not apply in this action as applies in the case of an action on tutelage while he who is under tutelage is still *impubes*.

5 ULPIAN, *Sabinus, book 43:* If a tutor does not return something deposited with him or lent to him by the father of the *pupillus*, he will be liable not only in the actions on loan for use and on deposit but also in that on tutelage. And if he received money which he was to return, most people agree that the money can be claimed in the action on loan for use or on deposit or in a *condictio*; and this is right because it was received improperly.

6 ULPIAN, *Edict, book 31:* If a son-in-power were administering a tutelage and after his release from paternal power acted fraudulently, does the action on tutelage lie on this account against the father? And it is just that the father be liable only for that fraud which was committed before his son's emancipation.

7 ULPIAN, *Edict, book 35:* If a *pupillus* became heir to one who was under the tutelage of the former's tutor, he will have an action against his own tutor on the basis of the inheritance. 1. If a tutor fell into the hands of the enemy, since the tutelage is considered to have ended, verbal guarantors who promised to keep the property safe are rightly liable if anyone acts as the protector of the *pupillus* and is willing to undertake the action on tutelage or if anyone has been made curator of his goods,

8 PAPINIAN, *Questions, book 28:* although by the law of *postliminium* the original tutelage can be restored.

9 ULPIAN, *Edict, book 25:* If a tutor came to be away on state business and was excused on the ground that he was away on state business, the action on tutelage lies. But if his absence on state business ceased, he who was appointed tutor in his place consequently ceases to be tutor and could be sued in the action on tutelage. 1. If a tutor was appointed to two *impuberes* who were brothers and then one of them fell into the statutory tutelage of his brother when the latter attained full age, Neratius says that he who was appointed ceased to be tutor. Therefore, because he ceases to act, the action on tutelage will also lie on behalf of the *impubes*; although, if he had been appointed by will, he would not have ceased to be tutor to the one who was still *impubes*, because statutory tutelage always yields to testamentary. 2. If a tutor were appointed conditionally by will and another appointed to act in the interim after inquiry, on the fulfillment of the condition, it has to be said that the action on tutelage lies because the latter has ceased to be tutor. 3. And if someone was appointed until a certain time, the same will hold. 4. Generally, the traditional view that a *pupillus* cannot sue his tutor in an action on tutelage so long as the tutelage is still running is true; for it would be absurd to demand an account from the tutor of the administration of the affairs of the *pupillus* while he was yet continuing to administer. But where the tutor ceases to act and then begins again, then he is liable to the *pupillus* for the first administration of the tutelage just as if he had received a loan of money from the father of the *pupillus*. We, therefore, must see what the result of the opinion is; for if there is only one tutor, he can hardly sue himself. But either he must be sued by a specially appointed curator or suppose him to have a fellow tutor who can institute proceedings against him he can sue him on this account in the action on tutelage. Indeed, if in the meanwhile he has ceased to be solvent, his fellow tutors will be liable because they did not sue him. 5. If a curator were joined with a tutor, albeit because the tutor were accused of untrustworthiness, he could not be compelled to defend an action on tutelage because he remained tutor. 6. But if the tutor's property was confiscated, it is accepted that an action will be given against the Treasury to a curator appointed in his place or to his fellow tutors. 7. Other actions apart from that on tutelage lie against a tutor even though he is still administering the tutelage, for example, the action of theft, the action for wrongful damage, and the *condictio*.

10 PAUL, *Summary of the Edict, book 8:* But these are not available to the *pupillus* while the tutor manages the tutelage; and although they cease on the death of the tutor, nevertheless, the *pupillus* has an action against his heir, because he ought to discharge it himself.

11 ULPIAN, *Edict, book 35:* If a son-in-power was administering a tutelage and was then emancipated, Julian says that he remained tutor, and when the *pupillus* had grown up, he could sue him for the time before emancipation for whatever he is able to pay and for the time after emancipation he can sue in full, but he can sue the father only to the extent of the *peculium*. For the action on *peculium* is available against him even after the *pupillus* has reached puberty, and the year during which the action on *peculium* is available does not begin to run until the tutelage has ended.

12 PAUL, *Summary of the Edict, book 8:* A son who is a tutor cannot sue his father for what he himself has done before puberty because even after the tutelage is over the claim cannot be made.

13 ULPIAN, *Edict, book 35:* If a tutor continued to administer the affairs of the *pupillus* after puberty, only matters which were necessary for the winding up of the tutelage come into the action on tutelage; so if the tutor, after the coming to puberty of his *pupillus*, sold his estates or bought slaves or lands, neither this sale nor the purchase comes into amount in the action on tutelage. For it is true that only those matters which are relevant come into the action on tutelage; but it is also true that if he began to conduct some business after the tutelage was ended, the action on tutelage becomes an action for unauthorized administration; for he should have discharged the tutelage himself. But if anyone who had administered the tutelage was then appointed curator to the adolescent, he can be sued in the action for unauthorized administration.

14 GAIUS, *Provincial Edict, book 12:* If a tutor ceased to administer for however short a time after puberty and began to act again, without doubt he can be sued in an action of tutelage for the former period and in the action for unauthorized administration of the latter.

15 ULPIAN, *Disputations, book 1:* If one of two tutors has come to an understanding with the other, although they are jointly fraudulent, the agreement could not benefit the latter, deservedly, since each is liable to the penalty for his own wrong. But if the latter had paid when sued, he would have benefited to the extent he paid the one who was not sued. Although both are guilty of fraud, nevertheless, it is sufficient that one should pay as in the case of two persons to whom things are lent or deposited with or who are given a mandate.

16 ULPIAN, *Edict, book 74:* If a tutor is sued on a stipulation or those who go surety for him are sued, it is doubtful whether, since an action on tutelage cannot lie, the action on stipulation lies either. And many think that this action too is postponed because it is to the same purpose. 1. But a curator of a *pupillus* or adolescent could be sued even though the curatorship continued.

17 ULPIAN, *Duties of Consul, book 3:* The Emperors Severus and Antoninus issued a rescript as follows: "Insofar as you ask whether your tutors or curators owe you anything, your request that you be supplied with money by them for the expense of a lawsuit has no justification."

18 PAPINIAN, *Questions, book 25:* When a tutor in administering the affairs of an *impubes* restrains the *pupillus* from dealing with his paternal inheritance, once the father's goods have been sold, it is often asked whether the *actio utilis* is left with the *pupillus* or whether it is given to the creditors. It is accepted that the action is to be divided between the *pupillus* and the father's creditors, which means that which was missing from the goods through the tutor's act is owed to the creditors but what was brought about by the fraud or negligence of the tutor in restraining the *pupillus* wrongfully is left to the boy. The latter action is no doubt unavailable until the *pupillus* has reached puberty, but the former is given to the creditors at once.

19 ULPIAN, *Replies, book 1:* If a debt were approved by the current curator, it is fruitless to sue the tutor for it.

20 PAPINIAN, *Replies, book 2:* It was agreed that the minor heir of one of two curators condemned for a disproportionately large sum should be restored in full. This does not

give a cause of action against the other curator though he was condemned for a lesser sum, unless the plaintiff is of an age when he ought to be assisted; but the dictates of equity suggest that he should be assisted by an *actio utilis* for the amount by which the other is relieved. 1. An action which is granted after reaching the age of twenty-five during the period of restitution against a tutor who has been condemned for a lesser sum in an action on tutelage is not useless just because the curators of the adolescent have been condemned for the same fault; and so if it is judged not to be the act of the curators, they can by the defense of fraud ensure that the action is assigned to themselves.

21 PAPINIAN, *Definitions, book 1:* When a *pupillus* ceded an action on tutelage against another tutor to a tutor whom the judge had condemned in full, although subsequently this judgment is satisfied, yet the ceded action is not terminated because as far as the tutor who was condemned is concerned it was seen to be paid as the price of the debt not in discharge of the tutelage.

22 PAUL, *Questions, book 13:* The condemnation of a tutor's defendant does not remove the privileged claim of the *pupillus*; for the *pupillus* did not contract with him freely.

23 PAUL, *Replies, book 9:* When the tutor's heir has been sued in an action on tutelage, this does not free the same person's curator by operation of law, nor is the defense of *res judicata* available to him. The same applies to magistrates' heirs.

24 PAUL, *Opinions, book 2:* A tutor who is appointed for a posthumous child, if no posthumous child is born, is liable neither in an action on tutelage, because there is no *pupillus*, nor in an action for unauthorized administration because he cannot be thought to have administered the affairs of one who was not born and so an *actio utilis* will be given against him.

25 HERMOGENIAN, *Epitome of Law, book 5:* The privileged claim of tutelage is available not only against the property of a tutor but also against the property of someone who unauthorizedly administers as tutor, it is also given in case of curatorship of *pupilli* and *pupillae* and male and female lunatics, if no security is given on this account.

4

THE *ACTIO CONTRARIA* OF TUTELAGE AND THE *ACTIO UTILIS*

1 ULPIAN, *Edict, book 36:* The praetor proposed the *actio contraria* of tutelage and brought it into use so that tutors might undertake an administration more readily in the knowledge that the *pupillus* was to be liable to them for matters arising out of their administration. For although *pupilli* cannot bind themselves without the tutor's authority and the tutor cannot bind the *pupillus* on his own account, nevertheless, it is accepted that the *pupillus* is liable to his own tutor at civil law without the tutor's authority as far as the administration is concerned. And so tutors are encouraged the more willingly to employ their own resources to the benefit of the *pupillus* when they know that they will get back what they have spent. 1. This action ought to be available both to the tutor and to someone who unasked administers as a tutor. 2. It is also the case that the *actio contraria* will be given to a curator either of a *pupillus* or of an adolescent or of a lunatic or prodigal. And the same holds for a curator of a womb. This was Sabinus's opinion, taking the view that other curators should be given the *actio contraria* for similar reasons. 3. We admit that this action is only available to the tutor at the end of his period of office, while it continues, it is not yet available. But if someone acts unasked as a tutor or administers a curatorship, the action lies immediately because in this case an action lies immediately against him. 4. Moreover, if someone is sued in an action on tutelage, he can set off what he has spent on

the affairs of the *pupillus*; so it is up to him whether he wishes to set off or counterclaim what he has spent. What, then, if the judge has not taken what is due into account, can he sue in the *actio contraria*? Indeed he can; but if the set-off were refused and he accepted this, the judge ought not to put the matter right in the *actio contraria*. 5. Should the action take account only of what has been spent on the account of the *pupillus* and in his affairs or also of what was owed to the tutor on other accounts, for example, money owed by the father of the *pupillus*? I prefer the view that as the tutor is free to proceed otherwise, this should not enter into the *actio contraria*. 6. But what if he delayed and did not sue because he was tutor? We must see whether he can be indemnified in the *actio contraria* of tutelage. This indeed is the better opinion; for just as whatever was expended for the benefit of the *pupillus* is recoverable in the *actio contraria*, so here he should recover what he is owed or security for it. 7. Therefore, although an obligation arose out of a claim which is time-barred, I think that the *actio contraria* of tutelage lies for it. 8. This action is available, it is agreed, even if the action on tutelage is not brought; for sometimes the *pupillus* does not wish to sue on the tutelage because he is owed nothing; if, on the contrary, more were spent on him than was necessary, nothing prevents the tutor from suing in the *actio contraria*.

2 JULIAN, *Digest, book 21:* It is all the more available if the action for liquidation of accounts is pending.

3 ULPIAN, *Edict, book 36:* What, then, if more is spent on him than there are funds? We must see whether this can be recovered. Labeo wrote that it could, and this is now accepted, if it was beneficial to the *pupillus* for the tutelage to be administered in this way. Otherwise, if it was not to his benefit, it is said that the *pupillus* ought to be absolved; for tutelages should not be administered so as to bankrupt *pupilli*. So the judge who hears the *actio contraria* will consider the benefit to the *pupillus* and whether the tutor undertook the expense properly. 1. Can he sue in the *actio contraria* for a discharge from the *pupillus*? No one has said that he may sue in the *actio contraria* for the purpose of freeing himself from the action of tutelage, but only for what he expends on the tutelage. He can recover money if he has spent his own, interest also, but at four percent per annum or whatever is the local rate, or at the rate at which it was borrowed, if it was necessary to obtain a loan to advance to the *pupillus* for a good reason, or at the rate which he paid to free the *pupillus*, or what it cost the tutor if the money was paid off as being of little benefit to the *pupillus*. 2. Clearly, if by chance the tutor owed money at interest and he himself paid something on behalf of the *pupillus*, he cannot be sued for interest himself nor will he pay it to the *pupillus*. 3. And so if he put something to his own use and then paid something on behalf of the *pupillus*, he ceases to have converted what he paid out and so will not pay interest. And if he first paid out on the business of the *pupillus* and he put something to his own use, he is not considered to have converted that amount which agrees in sum with that which he is owed and on that amount he will not pay interest. 4. We must see whether a tutor can claim interest only while he is tutor or also after the tutelage is ended or whether only if overdue. And it is rather the case that he can sue for it until the money is paid back to him; for his money ought not to be unprofitable. 5. If, however, it would be the capital of the *pupillus* that was liable to suit, he ought not to exact interest from the *pupillus*. 6. What, then, if he could not be paid from the pupillary property because it was on deposit for the purchase of estates? If, indeed, he did not approach the praetor so that the money is paid out or at least placed on deposit, he himself is to blame. But if he applied for this and did not obtain it, he will not be deprived of the interest. 7. It is sufficient in the *actio contraria* that the tutor has conducted business dealings well and carefully although what was done produced contrary results. 8. The *actio contraria* of tutelage takes into account both that which is put to the benefit of the *pupillus* whether before or after the period of tutelage, if a connection with business dealings during the tutelage can be proved, and what was spent beforehand, if someone acted unauthorized as tutor and afterward was ap-

pointed tutor or was curator of the womb; and even though he did not act unauthorizedly as tutor, what was spent in advance ought to come into account; for such expenses as were undertaken on the business of the *pupillus* are deductible in the action on tutelage, if indeed this was done in good faith. 9. This action is obviously perpetual and is available to the heir and against the heir and other successors in title and to and against those with an interest in the matter.

4 JULIAN, *Digest, book 21:* One who is removed from a tutelage should continue to live in the same place where he was on the termination of the tutelage so that he is liable to the actions; similarly, if the *pupillus* is over the age of puberty, he ought to proceed in an *actio contraria* if anything was owed him; for there is nothing to prevent a tutor's being untrustworthy although he has expended much on behalf of the *pupillus*, and he ought not to lose out in this way.

5 ULPIAN, *Replies, book 1:* I replied that the tutor's heir could have an *actio contraria* against *pupilli* if he had paid the amount for which they were liable.

6 PAUL, *Plautius, book 5:* If a tutor undertakes an obligation on behalf of his *pupillus*, he has the *actio contraria* even before he meets it.

5

ONE WHO ACTS UNASKED AS A TUTOR OR CURATOR

1 ULPIAN, *Edict, book 36:* It was essential that the praetor proposed an action on unauthorized tutelage; for it is frequently uncertain whether someone administered the tutelage as tutor or without tutorial authority; so he provided an action in each case so that whether the administrator were tutor or not, he nevertheless would be liable in an action. For great difficulties often arise, and it is not easy to tell whether someone was tutor and acted as such or was not and, though unauthorized, nevertheless discharged the task as if tutor. 1. An unauthorized tutor is someone who discharges the task of tutor of the affairs of the *impubes* or who thinks that he is tutor or who, though knowing that he is not, pretends that he is. 2. So though a slave acted as if he were tutor, the deified Severus issued a rescript giving an *actio utilis* against the master. 3. There is no doubt that an unauthorized tutor can be sued even before the age of puberty, because he is not actually tutor. 4. So if someone acts as unauthorized tutor for an *impubes*, when a tutelage has ended, he will be liable. 5. If he first administered as unauthorized tutor and subsequently as tutor, he is equally liable for the period during which he acted though unauthorized, although what is done on that account is subsumed in the action on tutelage. 6. If someone administers as though tutor the affairs of someone who is already past puberty and so cannot have a tutor, the action on unauthorized tutelage is not available, similarly in the case of one not yet born. For in order that someone can act as unauthorized tutor, there must be some person of an age to need a tutor, that is, he must be *impubes*. But an action for unauthorized administration will lie. 7. If a curator appointed by the praetor to an *impubes* administered without authorization, is he liable for acting as unauthorized tutor? And the truth is this action is not available because he was discharging his duties as curator. It remains to be seen whether one who was not tutor but, required to act by the praetor or by a governor while he believed himself tutor, administered the tutelage, is liable as an unauthorized tutor. And the better view is that although he administered under compulsion, nevertheless, he ought to be liable because he acted in the character of a tutor while not a tutor. But the curator acted not as tutor, but as curator. 8. Interest is taken into account in the action on unauthorized tutelage. 9. But is the liability only for what has been done or also for what ought to have been done? If it is something irrelevant to the tutelage, he will not be liable; for one who was not tutor should not interfere. But if he transacts some business, we must con-

sider whether he is liable for what he has left undone; and he will be liable if someone else would have done it. But if on learning that he was not tutor he ceased to administer, we must see whether he is liable for not having informed the relations of the *pupillus* so that they might obtain a tutor for him and he is indeed.

2 CELSUS, *Digest, book 25:* If one who acted as unauthorized tutor although not tutor sold the property of the *pupillus* but it has not been usucapted, the *pupillus* can reclaim it, although he gave security; for such administration of the property of the *pupillus* is different from that of a tutor.

3 JAVOLENUS, *Letters, book 5:* Is one who has been appointed tutor by will although he was unaware of it but acted as unauthorized tutor for the *pupillus* liable as tutor or unauthorized tutor? The reply was: I do not think he can be liable as tutor; for he must know that he is tutor before he can administer in the way that a tutor should administer.

4 POMPONIUS, *Quintus Mucius, book 16:* Whoever acts as unauthorized tutor must show the same fidelity and care as a tutor ought to show.

5 ULPIAN, *Edict, book 10:* An *actio contraria* is available to one who acts as unauthorized tutor.

6

WHAT IS ALLEGED TO HAVE BEEN DONE ON THE AUTHORITY OF A SUPPOSED TUTOR

1 ULPIAN, *Edict, book 12:* The justice of this edict is manifest: Those who enter into dealings should not be deceived by the employment of a supposed tutor. 1. These are the words of the edict. 2. It says: "Whatever on the authority of one who was not tutor. . . ." Much is left out of the edict; for what if there was a tutor but one who could not give authorization, for example, a lunatic or someone appointed in another province? 3. But Pomponius writes in his thirtieth book that sometimes, although one who is not tutor administers, the case does not fall under this part of the edict; for what if two tutors, one supposed the other real, gave authorization, would not what was done be valid? 4. Again, although this edict is written in the singular, Pomponius writes in his thirtieth book that if several nontutors are involved, the edict ought to apply. 5. The same Pomponius writes that even if an unauthorized tutor provided the authorization, nevertheless, this edict applies, unless perhaps the praetor announced that he would confirm what had been done with this authorization, but then its validity is secured by the praetor and not by operation of law. 6. The praetor says: "If the plaintiff was unaware of it, I will give *restitutio in integrum.*" This rightly is of no help to one who knows, since he deceives himself.

2 PAUL, *Edict, book 12:* He says: "if the plaintiff were unaware of it." For Labeo this includes the case of one who was told of it but honestly did not believe.

3 ULPIAN, *Edict, book 12:* Clearly, if he is someone who does not require assistance, then his knowing will not be fatal, for example, if one *pupillus* does business with another, since nothing can have resulted, the knowledge is not fatal.

4 PAUL, *Edict, book 12:* Someone under twenty-five will be helped even if he knows.

5 ULPIAN, *Edict, book 12:* Sometimes, although knowledge should be fatal, nonetheless, there will be *restitutio,* if he was required to defend an action by the praetor.

6 PAUL, *Edict, book 12:* The knowledge of the *pupillus* is not relevant but his tutor's is; certainly, if the *pupillus* is secured but even if the *pupillus* is secured, it is better that the *pupillus* should have his property returned than to await the uncertain outcome of his insurance. Julian gave this as his opinion if the *pupillus* would otherwise be cheated.

7 ULPIAN, *Edict, book 12:* Finally, the praetor says: "Against one who although not tutor is said to have given authorization fraudulently, I will give an action in which he

should be condemned for whatever the matter amounts to." 1. The tutor is not always liable; for it is not enough that he gave the authorization knowingly but only if he did so fraudulently; what if he provided the authorization under duress or through fear that he would be compelled, should he not be excused? 2. When the praetor says, "whatever the matter amounts to," I think that these words refer rather to the actual loss not to a penalty. 3. Pomponius rightly observes in his thirtieth book that the action takes into account the expenses which the plaintiff incurs in obtaining *restitutio*. 4. If there were a number who gave authorization, payment by one, but not the bringing of an action, releases the rest.

8 PAUL, *Edict, book 12:* And so if nothing or only part is received, Sabinus observes that the action will not be refused against the others for what is lacking.

9 ULPIAN, *Edict, book 12:* Pomponius observes in his thirty-first book that an action modeled on this action is available against anyone who fraudulently gives someone advice so that the latter unwittingly provides authorization. 1. These *actiones in factum* are available against heirs and other successors in title, though Labeo observes that they are only available within the year, because they are both penal and based on fraudulent conduct. Against those who are in another's power they are noxal.

10 GAIUS, *Provincial Edict, book 4:* If something were done on the authorization of a supposed tutor and meanwhile the limitation period has expired or the property has been usucapted, every inconvenience must be borne as if a real tutor has at that moment given his authorization.

11 ULPIAN, *Edict, book 35:* A supposed tutor who provided authorization on a contract for one under the age of twelve or fourteen is liable to an *actio in factum* for the fraud. 1. Whatever his station, whether independent or in someone's power, he is liable under this edict if he provided authorization fraudulently. 2. Even someone who gives authorization for a daughter-in-power to make a contract is liable. The same principle holds if someone trusted a slave-girl on a tutor's authorization; for in all these cases the contracting party is deceived because of the tutor, since he would not be able to contract with an *impubes* unless a tutor's authorization intervened. 3. Julian discusses in the twenty-first book of his *Digest* whether this action should be given against a father who gave his daughter in marriage under the age of twelve. And his opinion is that a father who wishes to introduce his daughter the sooner into her betrothed's family should be excused; for it was done more out of affection than fraud. 4. But if she had died under the age of twelve, since she would have had a dowry, Julian thinks that if the person to whom the dowry belongs was fraudulently deceived, he can defeat a claim by the husband with the defense of fraud in those cases where either the whole or part of the dowry would have been payable if the marriage had continued.

12 ULPIAN, *Replies, book 1:* There is no action against someone who when asked said he was tutor. If, however, not being tutor, his reply misled an adolescent to his disadvantage, an *actio utilis* is available against him.

7

TUTORS' AND CURATORS' VERBAL GUARANTORS, NOMINATORS, AND HEIRS

1 POMPONIUS, *Sabinus, book 17:* Although a tutor's heir is not himself tutor, nevertheless, he ought to complete business which remains unfinished on the tutor's death if he is of full age and male; in these circumstances, his own fraud is relevant. 1. A tutor's heir ought to return what was in his hands. If the heir seizes what he left with the *pupillus*, this is indeed a criminal matter; but it lies outside the scope of tutelage, and he is compelled to return it by an *actio utilis*.

2 ULPIAN, *Sabinus, book 39:* Someone is taken to apply for a tutor who applies through another, similarly for one who nominates through another.

3 ULPIAN, *Edict, book 35:* It is agreed that a verbal guarantor and his heirs can be compelled to a similar account of interest to which the tutor is liable.

4 ULPIAN, *Edict, book 36:* As we have shown that the heir is liable in an action on tutelage, we must see whether his own fraud or just the administration comes into consideration. And there is an opinion of Servius that if the heir continued to run the affairs of the *pupillus* after the tutor's death or if finding the money of the *pupillus* in the tutor's cash box, he spent it or sued for money for which the tutor had stipulated, he is liable in the actions on tutelage on his own account. Since it is possible to swear an oath in a suit against the heir on the basis of his own fraud, it seems possible to hold him liable for his own fraud in the action on tutelage. 1. Clearly, the tutor's negligence is not imputed to the heir. 2. The tutor's heir should pay interest on money borrowed from the property of the *pupillus*. At what rate and from what moment he ought to pay interest the judge is to fix in accordance with what is fair and reasonable. 3. It is reasonable to hold liable verbal guarantors chosen by the tutors if they were present and allowed their names to be entered on the court record without demur, as if a civil law stipulation had been entered into. The same is true of those who affirm in that those who have affirmed that the tutors are suitable occupy the place of verbal guarantors.

5 PAUL, *Edict, book 38:* If someone sues a tutor's guarantors on a stipulation of insurance, they have the same matters taken into account as tutors.

6 PAPINIAN, *Replies, book 2:* A *pupillus* commenced an action against his tutors and their guarantors. The judge died before he had given any opinion, and another judge was appointed but only in the action against the guarantors. It will be the judge's duty to assess a proportionate share on the tutors' account if they are solvent and the administration was not separate but joint.

7 PAPINIAN, *Replies, book 3:* If guarantors who gave the *pupillus* insurance insisted that the adolescent should first sue the tutor and then undertook by stipulation that they would make good what could not be obtained from him, it was agreed that the action for the remainder should be divided among those who were able to pay because they were taken to have accepted the guarantors' liability. For if money is lent on the mandate of several persons, the action will be equally divided so if what is given is paid on someone else's behalf, why should the type of action prevent an equal division?

8 PAUL, *Replies, book 9:* The heir of someone who was improperly appointed tutor or curator and did not interfere in the administration ought not to be liable for fraud or negligence. 1. Paul gives as his opinion that a lawsuit which was defended by a deceased tutor should be transferred against his heir with the result that the heir will not be excused even if he says that he did not acquire the tutelary property. Since the heir is liable to all actions of good faith for the tutor's fraudulent conduct, I think the same applies in the action on tutelage. But by *constitutiones* relief is available for the heir who is ignorant. However, this does not apply when the heir is sued on the tutor's death where the tutor died after joinder of issue; for by joinder of issue penal actions become actively and passively transmissible, and temporary actions become perpetual.

8

SUITS AGAINST MAGISTRATES

1 ULPIAN, *Edict, book 36:* An additional action is given against magistrates but not against the whole board nor against their guarantors; for these have promised to insure state property not that of the *pupillus*. So also the magistrates' nominators are not liable on this account, but only the magistrates themselves. But if a board accepts the risk, then those who were present are liable and it matters little whether they nominated or guaranteed or took the risk on themselves; an *actio utilis* lies against them. If a tutor was appointed by the municipal magistrates, he does not seem to have been chosen by the whole board. 1. Neither the praetor nor anyone else who has the right to appoint tutors is liable in the action. 2. If a provincial governor wished the magistrates merely to let him know the tutors' resources so that he might make the appointment, let us see how far they are liable. There is a rescript of the deified Marcus in which he determined that those who inform the governor are not to be held liable as if they had made the appointment, but only if they deceived him, giving false reports out of favor or bribery. Clearly, if the provincial governor ordered them to satisfy themselves, we cannot doubt but that they are liable even though the governor made the appointment. 3. If the provincial governor accepted nominations from someone and returned them to the municipal magistrate so that they could inform themselves about the person nominated and, informed accordingly, appointed tutors, will the magistrates be liable on the analogy of those who informed the praetor? There is a difference whether the magistrates themselves made the nominations to the governor or whether they made inquiries about those that the governor received from elsewhere. But I think they are liable in each case if they were affected by fraud or negligence. 4. Not only *pupilli* but also their successors in title can sue in the additional action. 5. If curators were appointed who were unsuitable, then the magistrates ought to be liable if the governor made the appointment at their suggestion or from their list of nominations. If he sent the matter back to them so that they should appoint or obtain security after appointment, the liability rests with them. 6. The magistrates are to blame if no tutor or curator at all were appointed; but they will only be liable if they did not appoint after being informed. So any loss which *pupilli* or adolescents have suffered in the meanwhile is certain to be met by those magistrates who have not done their required duty. 7. It should be noted that if municipal magistrates have deliberately left a tutelage for their successors or if they have deliberately delayed taking security until their successors are in office, this makes no difference. 8. The deified Hadrian provided by rescript that an action was also to be given against someone who was chosen to assess tutors' security. 9. If the magistrates agreed that tutors should be appointed at the risk of only one of their number, Hadrian provided by rescript that such agreements were not to prejudice the *pupillus*; for public law cannot be changed by the private agreement of the *duumviri*. In my opinion, however, he who took the risk should be sued first, and then when his means are exhausted, one can proceed against his colleagues just as, in the case where one made the appointment, we would say that first he and then his colleagues should be sued. 10. When persons suitable to act as tutor are lacking in a city in which there are *pupilli*, the magistrates' duty is to discover some of the more honest men of the surrounding communities and send their names to the provincial governors, not to arrogate the right of appointment to themselves. 11. If a magistrate appointed an initially sound tutor and did not take security, it is not enough; though if he took security from one chosen as sound, there is nothing wherewith the appointing magistrates can be charged, although subsequently both tutors' and guarantors' resources fail. Magistrates need not protect the *pupillus* from future chance events. 12. But although security was not provided, if the tutor

proves sound, when the action on tutelage can be brought, it is enough. 13. Proof that guarantors were not solvent when they were accepted does not lie on the *pupillus*, but on the magistrates who must show them to have been solvent. 14. The *pupillus* has no privileged claim over the magistrates' property but must take his share together with other creditors. 15. The magistrates should take security in this way; the slave of the *pupillus* or the *pupillus* himself, if he can speak and be present, stipulates for a promise from the tutors and again from their guarantors that the property will be safe, or if there is no one who can stipulate, a publicly owned slave or indeed the magistrate himself should stipulate to insure the safety of the property of the *pupillus*. 16. Clearly, when a public slave or the magistrate himself promises, the *pupillus* is given an *actio utilis*. 17. If a son-in-power were magistrate and failed to make the *pupillus* secure or was responsible for his being insufficiently secured, is an action available against his father and for how much? Julian says that an action on the *peculium* is available, whether or not he wanted his son to be a decurion. For even though he carried out his magisterial office with his father's permission, his father should not be liable beyond the value of the *peculium*, unlike the promise to ensure the safety of state property given by one who allows his son to be made a decurion.

2 ULPIAN, *Disputations, book 3:* The case was put of two tutors who had been appointed by municipal magistrates but security had not been taken; one had died in poverty and the other was made to satisfy the whole claim of the *pupillus*; could this tutor have an action against the municipal magistrates although he knew that his fellow tutor had not given security? In my opinion, since the *pupillus* was satisfied by this tutor, neither *pupillus* nor tutor can have recourse against the magistrates since the tutor never has an action against the magistrates, although the *senatus consultum* assists the *pupillus*. This is all the more so when it is the tutor's fault that security was not taken from his fellow tutor or that he was not proved untrustworthy, if he knew, as in the case put, that the magistrates had not secured him.

3 JULIAN, *Digest, book 21:* But if the tutor is free from blame for his part, it would not be unfair to give him an action against the magistrates.

4 ULPIAN, *Disputations, book 3:* Magistrates' heirs are not liable as magistrates are; no more is the tutor's heir liable for negligence. Though the magistrate is liable for all risks, his heir takes on only fraud and similar blame.

5 JULIAN, *Digest, book 21:* Two tutors divided the administration of the tutelage between them and one died without an heir; should an action be brought by the *pupillus* against the magistrates who did not see to his being secured? Or against the other tutor? I gave the opinion that it was fairer to bring an action against the other tutor than against the magistrate; for since he knew that the *pupillus* was unsecured, he ought to have taken on the administration of the whole tutelage including that part which was committed to the other tutor. He was in a similar position to one who did not undertake some particular business on behalf of the *pupillus*; for although he had administered part of the business of the *pupillus*, yet he is liable for that which was not done when it ought to have been done.

6 ULPIAN, *Edict, book 1:* There is a rescript of the deified Pius providing that an action ought to be awarded against a magistrate's heirs only after inquiry; if the magistrate's neglect was such that he avoided taking any security, then it is right to put him in the position of a guarantor so that his heir may be liable. If, however, he took security from suitable persons and they failed afterward, the magistrate could successfully defend this action and so should his heir all the more so. Finally, he provides that the action should not be given against the heir unless the magistrate clearly took unsuitable guarantors.

7 CELSUS, *Digest, book 11:* Please give an answer to the question whether an action lies for a proportionate share against a magistrate who appointed a tutor or whether a choice is given to the former *pupillus* whom he would rather sue. His opinion was that

if the magistrate acted fraudulently with the result that the *pupillus* was less well secured, he has an action for the full amount against whichever he wishes; but if it were done negligently and not fraudulently, then I think it is better to give the action proportionately against each of them in order to protect the property of the *pupillus*.

8 MODESTINUS, *Replies, book 6:* Magistrates failed to take security from an adult's curators to insure the property and one of them died without an heir. Should his colleague furnish an indemnity in full? Modestinus replied that there was no reason why he should not.

9 MODESTINUS, *Pandects, book 4:* The question was put whether the principal could be claimed with interest in an action against magistrates or not, since it was provided that one could not sue for interest on penalties. And the deified Severus and Antoninus held that one could sue for interest since the same action is available against magistrates as against tutors.

9

THE PROPERTY OF THOSE IN TUTELAGE OR CARE WHEN THERE IS NO ORDER FOR SALE OR EXCHANGE

1 ULPIAN, *Edict, book 35:* By the Emperor Severus's legislative speech tutors and curators are forbidden to sell country or suburban properties. 1. This speech was made in the senate on the Ides of June in the consulate of Tertullus and Clemens and was as follows: 2. "Moreover, conscript fathers, I forbid tutors and curators to sell country or suburban properties unless the relatives provided in a will or codicil that this could be done. If there is so much owing that the debt cannot be settled from other property, then his excellency, the urban praetor, is to be approached and will decide in his discretion what can be sold or should be mortgaged, saving the right of the *pupillus* to sue if he can prove afterward that the praetor has been deceived. If the property is held in common and a joint owner applies for its division or if a creditor who took a field as security from the relative of the *pupillus* puts in his claim, I propose no alteration." 3. If the deceased had property for sale in his lifetime but did not provide for their sale in his will, there should be no sale; for one who wanted to sell himself did not necessarily want them sold after his death. 4. If someone under twenty-five bought properties which were secured by *pignus* to the vendor until he paid the price, I think the *pignus* is worthless; for when a *minor* obtains ownership, he cannot undertake to be bound.

2 PAUL, *The Speech of the Deified Severus, sole book:* But this raises the point that the pledge was obtained along with the ownership and the obligation was there from the start. If he bought it from the treasury, the pledge would undoubtedly have been saved. If, therefore, such a case happens to a private seller, imperial intervention is required to confirm the pledge by rescript.

3 ULPIAN, *Edict, book 35:* But what if the funds of one *pupillus* are used to buy the property of another *pupillus* and it was transferred to a *pupillus* or a *minor*; can he whose money was used to buy the property have the pledge? And it is the better view that the right of pledge be secured for the *pupillus* whose money bought the property according to the *constitutio* of our emperor and his deified father. 1. Pupillary property can be taken for pledge by the order of a magistrate or governor or some other authority and sold. Anyone can be put into possession of pupillary property by the praetor, and a right of pledge can be arranged either to protect legacies or for threat-

ened damage; so if he applies, he could be ordered into possession. For these mortgages and sales take place not through the choice of a tutor or curator but by the magistrates' authority. 2. Again, it may be asked whether, if pupillary property be claimed from the tutor and is not restored, the tender of the property's value works an alienation. And the better view is that it does since the alienation was not effected by the tutors. 3. The same is to be said if the property of the *pupillus* was claimed and the tutors restored it against the will of the *pupillus*; for here the alienation is validated by the authority of the judgment. 4. If the *pupillus* had a right of *emphyteusis* or *embateusis*, can this be alienated by the tutors? And the better view is that it cannot, although the right of ownership is greater. 5. Nor can a usufruct be alienated, although the *pupillus* had only the usufruct. Therefore, can it be lost in practice by nonuse if the tutor gives grounds for this? It is clear that it should be given back. But if the *pupillus* has title, he cannot alienate either usufruct or use, although the speech says nothing about usufruct. Similarly, no servitude can be imposed on the property of the *pupillus* or adolescent; nor can a servitude be relinquished, as is accepted with regard to dotal property. 6. If the *pupillus* owns stone quarries or alum mines or other mines or claypits, silver mines or anything of that sort,

4 PAUL, *The Speech of the Deified Severus, sole book:* insofar as these can be privately owned,

5 ULPIAN, *Edict, book 35:* I prefer the view that alienation is prevented by the speech. 1. And the same applies if the *pupillus* owns salt pans. 2. If the *pupillus* possesses another's estate which was bought in good faith, I think it must be said that the tutors cannot alienate it. But that which was sold as pupillary property is properly sold. 3. If an estate be pledged to the *pupillus*, can the tutors sell it? For here they are selling another's, the debtor's, property. If, however, the *pupillus* or his father had applied for the right of ownership, the result is that it cannot be alienated as it is pupillary property. The same is true if he were ordered into possession on account of threatened damage. 4. If an estate were left by legacy or by *fideicommissum* to Seius via a *pupillus* instituted heir, can the tutors convey this estate without the praetor's permission? And I feel that if the testator made a legacy of his own property, the speech does not apply; but if of the property of the *pupillus*, then the speech will apply, and alienation is impossible without consulting the praetor. 5. If the *pupillus* made a stipulatory promise, can he discharge it without the praetor's permission? And the better view is that he cannot; otherwise, someone could contrive a justification for alienation. 6. But if the father promised an estate by stipulation and the *pupillus* succeeded to the promise, it is easier to say that it can be conveyed without the praetor's permission. Similarly, if he succeeds by inheritance to anyone else similarly bound by promise. 7. For the same reason if his ancestor or anyone else whom the *pupillus* succeeded sold the land, the *pupillus* can complete the rest of the sale without consulting the praetor. 8. A *pupillus* cannot refuse to take a legacy of property without the praetor's permission; for no one doubts that this would be an alienation since the property is that of the *pupillus*. 9. The tutors ought not to be allowed to sell too readily on the pretext of debt; this should not afford them an easy way to sell.

So the senate gave the praetor the decision on such a matter, and his job is first to examine whether it is possible for money to be raised elsewhere to discharge the debt. Therefore, he should discover whether the *pupillus* has funds either in cash or in loans which could be called in or in stored crops or even in anticipation of revenues and rents. Then, he should inquire whether there are not other goods apart from the landed estates which could be sold and from the proceeds of which the debt could be paid. If, however, he discovered that it was not possible to discharge the debt without selling off some of the landed property, then he may allow it to be sold, if, indeed, the creditor is pressing for payment or the amount of interest accruing forces discharge of the debt. 10. The praetor must similarly decide whether to allow a sale or mortgage. He must watch carefully that no greater burden of interest is laid on the land than is necessary to pay off the debt. If he chooses sale, then he must watch that a large property is not sold to pay a small debt; but if there is another property smaller or of less use to the *pupillus*, he should rather order that to be sold than the larger or more useful one. 11. Whenever he is asked by someone to allow a sale, he ought first to inform himself about the means of the *pupillus*. He should not believe tutors and curators too readily; for, sometimes, for the sake of their own pockets, they earnestly press the praetor that properties must be sold or mortgaged. So he should ask close relations of the *pupillus* or kinsmen or any trustworthy freedmen or anyone else who has a knowledge of the pupillary property, or if no one can be found or if those found are untrustworthy, he should order accounts to be made up and an inventory prepared of the pupillary property and he should appoint a representative for the *pupillus* who can put arguments before the praetor as to whether he should agree to a sale or mortgage. 12. If the praetor when approached allowed provincial properties to be sold, is what he has done valid? I think it would be valid so long as the tutelage is administered at Rome and the tutors agree to this. 13. However, to prevent tutors, by the pretext of alleging a debt, using up the money they receive, the praetor should take care that money raised is paid to the creditors. He should issue a formal resolution and appoint a bailiff who can tell him that the money was spent for those purposes for which the alienation or mortgage was requested. 14. If there is no debt but the tutors suggest that it would be advantageous to sell some properties either to buy others or indeed to abandon some, we must see whether the praetor should allow this. And the better view is that he cannot; for he is not given an absolute discretion to sell off the property of the *pupillus*, but only to the extent that there is a debt outstanding. So if he permitted a sale when no debt was alleged, we must say as a consequence that it is void and so is the decree. The praetor cannot order sale indiscriminately but only if debt presses. 15. The action of the *pupillus* remains if he can afterward prove that the praetor has been deceived. Is the action awarded *in rem* or *in personam*? And the better view is that it is *in rem* not just *in personam* against the tutors or curators. 16. We should take joint property to mean properties owned in undivided shares. Otherwise, if they are jointly held in divided shares, the speech does not apply, and there is room for a decree.

6 ULPIAN, *All Seats of Judgment, book 2:* But if perhaps one owns the estate and the other has the usufruct, it is the better view that that part of the speech referring to division should not apply; for there is no common ownership.

7 ULPIAN, *Edict, book 35:* If the common property is owned by *pupilli* who have different tutors, we must see whether there can be any alienation. Since an application must be made, I think alienation is prevented; for neither can apply, but both require an application. Again, if they have the same tutors, the alienation is all the more hindered. 1. If a *pupillus* gave a pledge with the praetor's permission, there will be some doubt whether alienation can be prevented. But it must be said that it is open to the creditor to enforce his right; however, he will be on surer ground if he first applies

to the praetor. 2. If a father or relative is tutor to any of his offspring, should he apply to the praetor if he wishes to mortgage? And the better view is that he ought; however, the praetor should be prepared to agree with the father. 3. If the praetor allowed the tutors to sell but they mortgaged the property or vice versa, is what has been done valid? And in my opinion, someone who does otherwise than he was permitted to do achieves nothing. 4. But what if the praetor decreed: "I allow sale or mortgage"; does the tutor have a free choice as to what to do? And the better view is that he has, although we recognize that the praetor has not fully discharged his responsibility; for he ought to make the choice himself whether to permit a sale or a mortgage. 5. If the tutor mortgaged without a decree, although the mortgage is not valid, there is still room for the defense of fraud when the tutor received the loan and paid the creditor under the pledge. 6. Again, it must be seen whether it is possible to mortgage another's property; and it must be said that the mortgage is valid if the same principal is taken and no higher rate of interest, so that the first creditor's right passes to the second.

8 ULPIAN, *All Seats of Judgment, book 2:* There is no doubt that those who are in law neither tutors nor curators, but act as unauthorized tutor or curator cannot sell the property of *pupilli* or adolescents. 1. If he is the curator of a lunatic or some other adult, we must see whether the sale is valid under the old law or whether we apply the speech. And I think that because the emperor speaks of *pupilli* and mentions curators as well as tutors, the speech applies equally to those who take curators on account of age; and as far as others are concerned, I think the opinion of the speech must apply. 2. Can common property be mortgaged? I do not think it can be without a decree; for the speech only exempts the termination of joint ownership not an increase in its difficulties.

9 ULPIAN, *Opinions, book 5:* Although the governor's predecessor had decreed that certain property could be sold which the tutor then bought from the *pupillus* for himself, hiding behind the name of another buyer, nevertheless, if his successor has discovered this willful fraud committed against the *senatus consultum* and a tutor's trust, he must consider how far such a deceitful trick is to receive exemplary punishment.

10 ULPIAN, *Opinions, book 6:* If the land of a *pupillus* or adolescent is illegally sold after the *senatus consultum* and if on that account a valuation is made in court in an action on tutelage or *actio utilis* and paid, a *vindicatio* for the land is prevented on equitable grounds.

11 ULPIAN, *Duties of Proconsul, book 3:* If it is desired to sell the lands of one under twenty-five, the provincial governor should allow it after an investigation. The same holds if curators of lunatics or prodigals or anyone else wish to sell lands.

12 MARCIAN, *Action on Mortgage, sole book:* If someone's tutor pays off the creditors of the father of the *pupillus* and steps into their place, this is not contrary to the *senatus consultum.*

13 PAUL, *The Speech of the Deified Severus, sole book:* It must be seen whether an estate which is barren or rock-strewn or unhealthy cannot be alienated. And the Emperor Antoninus and his deified father issued a rescript in the following terms: "We are not persuaded by the fact that the estate you wish to sell is unprofitable since in any case the price will be settled with reference to its productivity." 1. Although the tutor may neither sell nor mortgage pupillary property, nevertheless, Papinian, in the fifth book of his *Replies*, says that although the tutor of a *pupillus* cannot lawfully sell without the praetor's decree, yet if he goes on, he did sell in error and paid what he received to the boy's father's creditors, the owner can effectually plead the defense of fraud against those claiming the property and fruits, if they do not proffer the price and interim interest which are owed to the creditors, so long as he could not discharge the debt by using other resources. I, however, remarked that even if he could have

paid, if that property was saved which would have gone to discharge the debt, still it must be said that the defense of fraud can be pleaded to the extent that the *pupillus* seeks to profit out of another's loss.

14 PAUL, *Replies, book 9:* Paul replied that although the father's will appears subsequently to be void, nevertheless, the tutors of *pupilli* and curators of children cannot be thought to have done anything contrary to the deified emperor's speech if they sold pupillary property in the country in accordance with the deceased's wishes in his will.

10

CURATORS APPOINTED FOR LUNATICS AND OTHERS OVER AGE

1 ULPIAN, *Sabinus, book 1:* The *Law of the Twelve Tables* prevents a prodigal's dealing with his property, and this was originally introduced by custom. Today, however, praetors and governors, if they encounter persons who have set neither time limit nor boundary to their expenditure, but squandered their substance by extravagance and dissipation are accustomed to appoint a curator for them on the analogy of a lunatic. They remain in care, the lunatic until he regains his health of mind, the other until he comes to his senses; when this happens, they automatically cease to be in their curator's power. 1. The care of one forbidden to deal with his property is not entrusted to his son; but there is a rescript of the deified Pius which gives preference to a son in the case of a lunatic father, so long as he is suitable.

2 PAUL, *Duties of Proconsul, book 1:* But in the case of others who cannot manage their property to whom the proconsul appoints curators or orders them to be appointed, he will not hesitate to appoint a son as curator to his father.

3 ULPIAN, *Sabinus, book 31:* While the instituted heirs are considering acceptance, the praetor will appoint a curator of the estate.

4 ULPIAN, *Sabinus, book 38:* The care of a lunatic mother belongs to her son; for piety is owed equally to both parents, although their power is not equal.

5 GAIUS, *Provincial Edict, book 9:* By *senatus consultum* a curator is appointed when an eminent person, for example, a senator or his wife, is in such a predicament that his goods must be sold; so that as much as possible can be properly raised from his property to pay his creditors, a curator is appointed either by the praetor or in the provinces by the governor to sell off the property.

6 ULPIAN, *All Seats of Judgment, book 1:* The praetor must be careful not to appoint a curator for someone rashly without the fullest investigation; for many feign madness or mental illness so as to escape their legal obligations by receiving a curator.

7 JULIAN, *Digest, book 21:* The curator's concern and care should extend over the health and well-being of the lunatic as well as the property. 1. A curator appointed for a lunatic and ordered by decree to give security did not do so, but transferred certain objects from the property in a proper manner. If the lunatic's heirs claim the objects which the curator transferred and the defense is raised "unless the curator sold it," a *replicatio* ought to be given, "if he sold it after giving security according to decree." If the curator paid off the lunatic's creditors with the money he received, the possessors will be protected by a *triplicatio* of fraud. 2. The proconsul removed a madman's curator from office because he had not given security and managed the property badly and put another curator in his place. The latter, although he had not given security either, sued the removed curator for unauthorized administration. Now when the heirs of the madman sue the same person for unauthorized administration

and he puts up the defense of *res judicata* between himself and the curator, a *replicatio* will be given to the heirs "if he who sued had given security." Whether this *replicatio* will work against the curator is for the judge to decide; for if he put the money paid as a result of the judgment among the lunatic's possessions, the *triplicatio* of fraud will assist him. 3. It was asked whether a release can properly be given by one of two curators of a lunatic or whether one could alienate the lunatic's property. I replied that he was properly released. Further someone who bought the lunatic's estate in a proper manner from one of the curators can usucapt, because release, sale, and conveyance are matters of fact rather than of law and so it is enough if one of the curators acts, the other being taken to agree. But if the other is present and forbids the release, or forbids the sale or conveyance, the debtor is not discharged, nor can the buyer usucapt.

8 ULPIAN, *Duties of Proconsul, book 6:* A curator should be appointed to look after the property of an unborn child, and the proconsul will order him to give sufficient security to ensure the safety of the property in the opinion of a reasonable man. But this is only if he is not appointed after examination; for if he is appointed after examination, there is no need for security.

9 NERATIUS, *Parchments, book 1:* In the case of someone who was allowed by the senate to appoint curators to sell his goods, the creditors were not allowed to sell the goods although the creditors preferred to do this once the privilege was granted. For although, before anything was done, the choice was theirs to do as they wished, once they have chosen the one course, they must abstain from the other. All the more then if the curator appointed to sell the goods died without completing the business; for then a fresh curator must be appointed. The heir of the first curator is not to be concerned; for it could happen that he is not suited to the business either on account of sex or age or greater or lesser status than that observed in the first curator. There could be a number of heirs and neither can it be arranged that they should all administer, nor is it possible to say that one should be especially concerned in this matter.

10 ULPIAN, *Edict, book 16:* Julian wrote that those who were forbidden to deal with their goods by the praetor could not convey anything to anybody, because they have no goods since they are forbidden to alienate. 1. The curator of a lunatic could indeed convey his own property as if it belonged to the lunatic and so transfer ownership, but if he conveys the lunatic's property as if it were his own, it must be said that this does not transfer ownership because he did not convey it while administering the lunatic's affairs.

11 PAUL, *Plautius, book 7:* A pledge given by a lunatic's curator is valid if it was given with an eye to the lunatic's needs.

12 MARCELLUS, *Digest, book 1:* It is agreed that an agnate or other curator of a lunatic cannot dedicate the lunatic's property; for the agnate has no absolute power to alienate the lunatic's property, but only to the extent that the administration of his affairs demands.

13 GAIUS, *Provincial Edict, book 3:* Often the care of a lunatic or a prodigal belongs to one person under the *Law of the Twelve Tables*, but the praetor gives the administration to another, for example, when the *legitimus heres* is seen to be unfit for the job.

14 PAPINIAN, *Replies, book 5:* It is not right for a husband to be appointed curator to his mentally handicapped wife.

15 PAUL, *Views, book 3:* Women, too, who live extravagantly can be forbidden to deal with their goods. 1. Both male and female lunatics have a privileged claim over the goods of their curator. A prodigal and others generally can obtain the privilege over their curator's goods by decree, although there is no mention of them in the edict.

16 TRYPHONINUS, *Disputations, book 13:* If a father nominated a curator in his will for a lunatic over the age of puberty and over twenty-five, the praetor should appoint him

in accordance with the father's wishes; the appointment of a curator in these circumstances belongs to the praetor as is provided in a rescript of the deified Marcus. 1. It follows that if the father nominated a curator for a prodigal, the praetor should abide by his wishes and appoint him curator. Should he do so in all cases or only if he would have forbidden him to deal with his goods, even if his father had not so provided in his will? Especially if the prodigal has children? 2. The father, however, could provide for his grandchildren in another way, if he had made them heirs and disinherited his son, leaving him a legacy of something from them which was enough for his sustenance and adding an explanation of the need for the decision. If he had no grandchildren in his power since they were born of an already emancipated son, he could institute them heirs on condition that they were emancipated by their prodigal father. 3. But what if the prodigal son will not agree to this? In any event, the testator's judgment is to be followed in case one whom the father thought prodigal with good cause should be thought suitable by the magistrate for some reason, perhaps through some flaw of his own.

17 GAIUS, *Manumissions, book 1:* A lunatic's curator ought in no way to grant freedom because this is not a matter of administration. In so granting, he only alienates the lunatic's property if this is part of the administration of his affairs. So if he alienates as a gift, the delivery will not be valid unless, in the judge's opinion, it is done for the greater benefit of the lunatic.

BOOK TWENTY-EIGHT

1

THOSE WHO CAN MAKE WILLS AND HOW WILLS ARE MADE

1 MODESTINUS, *Encyclopaedia, book 2:* A will is a lawful expression of our wishes concerning what someone wishes to be done after his death.

2 LABEO, *Posthumous Works, Epitomized by Javolenus, book 1:* In the case of someone who is making his will, at the time when he makes the will, soundness of mind is required, not health of body.

3 PAPINIAN, *Questions, book 14: Testamenti factio* is matter not of private, but of public law.

4 GAIUS, *Institutes, book 2:* If we are inquiring whether a will is valid, we ought first of all to consider whether the person who made the will had *testamenti factio,* and then, if he did have it, we may investigate whether he made a will in accordance with the rules of the civil law.

5 ULPIAN, *Sabinus, book 6:* Let us consider from what age males or females can make a will. The better view is that in the case of males, we should take the fourteenth year, but in the case of females, the twelfth, completed. But should a person have gone beyond his fourteenth year in order to be able to make a will or is it enough to have completed it? Suppose someone born on the first of January made a will on his fourteenth birthday; is the will valid? I say it is valid. Moreover, I think that even if he made it on the thirty-first of December after midnight on the thirtieth, the will is valid; for he is regarded as having already completed his fourteenth year then, as Marcian holds.

6 GAIUS, *Provincial Edict, book 17:* A person in parental power has not the right to make a will, and this is so much the case that even if his father gives him permission, he still cannot thereby lawfully make a will. 1. Deaf or dumb persons cannot make a will; but if someone has become dumb or deaf after making a will, because of illness or some other accident, the will nevertheless remains valid.

7 AEMILIUS MACER, *Law on the Five Percent Inheritance Tax, book 1:* If a dumb or deaf person has obtained from the emperor the privilege of making a will, the will is valid.

8 GAIUS, *Provincial Edict, book 17:* The will of a person in captivity, which he made while there, is not valid, although he has returned. 1. If a person has been interdicted from fire and water, neither any will which he made before the interdict nor any which he has made afterward is valid; also the property which he had when he was condemned will be forfeited to the state, or if his estate does not appear to be solvent, it will be made available to his creditors. 2. Those deported to an island are in the same position. 3. But those relegated to an island or interdicted from Italic territory and their own province retain the right to make a will. 4. But those who are condemned to be beheaded or to fight with wild beasts or to the mines lose their freedom and their property is forfeited to the state from which it is apparent that they lose *testamenti factio.*

9 ULPIAN, *Edict, book 45:* If a person in custody after an accusation of crime has died before his condemnation, his testament will be valid.

10 PAUL, *Views, book 3:* Someone who has lost his hands can make a will although he cannot write.

11 ULPIAN, *Sabinus, book 10:* Hostages cannot make a will except by special permission.

12 JULIAN, *Digest, book 42:* By the *lex Cornelia* the wills of those who have died while in the power of the enemy are confirmed with the same effect as if those who had made them had not fallen into the power of the enemy, and, in the same way, their inheritance belongs to whoever is entitled. Therefore, a slave appointed heir by a person who has died while in the power of the enemy, will be free and heir, whether he wishes to be so or not, although it is not really correct to call him a *necessarius heres*; for even the son of a person who has died while in the power of the enemy is obliged to accept the inheritance, even if he does not wish to do so, although he cannot be called a *suus heres*, when he was not in the power of the deceased.

13 MARCIAN, *Institutes, book 4:* Persons who have been captured by robbers, as they remain free, can make a will. 1. Again, those who are acting as legates in a foreign country can make a will. 2. If someone condemned for a capital crime has appealed and in the meantime, while the appeal is pending, has made a will and died while the appeal is still pending, his will is valid.

14 PAUL, *Rules, book 2:* If a slave who has been manumitted in his master's will does not know that his master has died and that the inheritance has been accepted, he cannot make a will, although he is already head of a household and independent; for a person who is uncertain of his own status cannot make definite provisions in a will.

15 ULPIAN, *Edict, book 12:* Persons who are in doubt or in error about their status cannot make a will, as the deified Pius stated in a rescript.

16 POMPONIUS, *Rules, sole book:* A son-in-power, the slave of another person, a *postumus*, and a deaf person are said to have *testamenti factio*; for although they cannot make a will, they can still acquire by will for themselves or for others. 1. MARCELLUS notes: A lunatic also has *testamenti factio*, although he cannot make a will; but he has *testamenti factio* because he can acquire a legacy or a *fideicommissum* for himself; for personal actions are acquired by those who are of sound mind also, even if they do not know of the acquisition.

17 PAUL, *Views, book 3:* A person, mentally afflicted when he is in poor physical health, cannot make a will while he is so affected.

18 ULPIAN, *Sabinus, book 1:* A person interdicted by statute from managing his property cannot make a will, and if he has done so, it is invalid by operation of law; but any will which he may have antedating the interdiction will be valid. It is, therefore, quite right that he should also be unable to be used as a witness to a will, as he has not *testamenti factio* either. 1. If someone has been found guilty of writing defamatory verses, it is expressly laid down by *senatus consultum* that he be *intestabilis*, and, therefore, he will be able neither to make a will nor to be used as a witness to a will.

19 MODESTINUS, *Encyclopaedia, book 5:* If a son-in-power or a *pupillus* or a slave has made and sealed a testamentary deed, *bonorum possessio* cannot be given in accordance with it, although the son-in-power has become independent or the *pupillus* has reached puberty or the slave has become free by the time of death, because a testamentary deed made by someone who did not have the power to make a will is null.

20 ULPIAN, *Sabinus, book 1:* A person instituted heir in a will cannot be a witness to the same will. The opposite is held in the case of a legatee and someone appointed a

tutor; for they can be used as witnesses, if there is nothing else to prevent them, as, for example, if he is *impubes* or in the power of the testator. 1. However, the word "power" is to be referred not only to children who are in power but also to someone whom he [the testator] has redeemed from the enemy, although it is settled that such a person is not a slave, but is held under a certain bond, until he pays the redemption price. 2. Conversely, the question can be raised, whether the father of someone who can make a will of his *peculium castrense* can be used by him as a witness to the will. And Marcellus writes in the tenth book of his *Digest* that he can; and so it will also be possible to use his brother. 3. But what we have said in relation to a will about the prohibition of the use as witnesses of those who are in power, you may apply to all cases of the use of witnesses, where there is any kind of transaction, which results in acquisition of something. 4. A lunatic cannot be used as a witness either, as he is not of sound mind; but if he has an intermission, he can be used as a witness during that period; also a will which he completed before his lunacy will be valid, and *bonorum possessio* is competent on that will. 5. I think that someone condemned under the statute on *repetundae* can be used as a witness in making a will, as he is forbidden to be a witness specifically in judicial proceedings. 6. It is true that a woman will not be able to act as a witness in relation to a will, but as an argument that otherwise a woman can be a witness, there is the *lex Julia de adulteriis*, which specifically forbids a woman condemned for adultery to be produced as a witness or to give testimony. 7. It is also right that a slave cannot be used in solemn acts as he is totally excluded from participation in the civil law, and even in the praetor's edict. 8. The old jurists also thought that those who are used in the solemnities of a will ought to remain until the last act of witnessing is completed. 9. And yet we do not require understanding of what is said; for this was the answer given by the deified Marcus in a rescript to Didius Julianus in the case of a witness who did not know Latin; for it is enough if someone realizes, it may be by observation what the transaction in which he has been asked to take part is. 10. But if the witnesses have been kept there against their will, they [the old jurists] think that the will is not valid.

21 ULPIAN, *Sabinus, book 2:* The heirs should be declared openly in such a way that their names can be heard; therefore, the testator is allowed either to declare the names of the heirs or to write them; but if he declares them he should do so openly. What does "openly" mean? Not indeed publicly, but so that the name can be heard; but heard not by everyone, but by the witnesses; and if more witnesses than are legally required have been called in, it is enough that the legally required number hears. 1. If it has been decided that something should be changed after the will has been made everything must be done again from the beginning. But if someone declares or writes something rather obscure in his will, there is a question whether he can explain it after the solemnities have been concluded, as, for instance, if he had made a legacy of Stichus when he had several slaves called Stichus and did not state which one he intended; if he left a legacy to Titius when he had many friends called Titius, if he had made an error in the *nomen* or the *praenomen* or *cognomen* when he had made no error over the person intended, will he be able to state afterward which person he intended? And I think he can; for he is not making a grant now but explaining a grant already made. But again, if he afterward added a note to a legacy either orally or in writing or a sum or the name of a legatee which he had not written or the quality of coins, could he properly do so? And I think that even the quality of coins can be added afterward; for even if this had not been added, it would certainly be accepted that a conjecture could be made on what he left, based on related writings or on the custom of the head of the household or of the region. 2. In the case of wills, where the witnesses ought specifically to be asked to be present for the making of a will, it is settled that witnesses who may perhaps have been called for some other purpose are not acceptable for making a will. Which is it to be understood in this sense, that although they were called or collected for some other purpose, if they be informed before acting

as witnesses that they have been called to make a will, they can properly give their services as witnesses. 3. A will ought to be made in one continuous act. By "one continuous act" is meant that no act unconnected with the will should intervene; but if he [the testator] does something relevant to the will, the will is not vitiated.

22 ULPIAN, *Edict, book 39:* We can be used at the same time to make up the number of witnesses required, for example, myself and my father and others as well, who were in the same power. 1. We ought to examine the condition of witnesses at the time when they sealed the will not at the time of death; if, therefore, they were suitable persons to be used when they sealed, it does not matter what may have happened to them afterward. 2. If I accepted a ring from the testator himself and sealed the will with it, the will is valid, as if I sealed with someone else's ring. 3. If the seals have been disturbed by the testator himself, the will is not regarded as sealed. 4. If any of the witnesses did not write his name on the will, but did seal it, it is as if he had not been used as a witness; and if, as many do, he wrote his name on but did not seal, we will still say the same. 5. But are we only allowed to apply a seal impressed with a ring, or also a seal not impressed with a ring, but with some other impress? For men seal in various ways. And the better view is that someone can seal not only with a ring but with anything, provided that it has some distinguishing feature. 6. There is no doubt that a will can be sealed in the nighttime as well. 7. A will ought to be accepted as sealed even if the seals have been impressed on the thread tying the will together.

23 ULPIAN, *Disputations, book 4:* If a will which the testator has resealed has been sealed again with the seals of seven witnesses, it will not be incomplete, but will be valid by both laws, not only the civil law but the praetorian.

24 FLORENTINUS, *Institutes, book 10:* A person can at the same time seal one will in several copies, and this is sometimes necessary, for example, if he is about to go on a voyage and wishes both to take with him and to leave behind evidence of his testamentary dispositions.

25 JAVOLENUS, *Posthumous Works of Labeo, book 5:* Varus, in the first book of his *Digest*, has written that where a person who was making a will became dumb after he had declared who should be the first heirs but before he stated the second heirs, Servius replied that he had begun to make a will rather than made one; therefore, the first-named would not be heirs under that will. Labeo thinks that this is true only if it was certain that the person who made the will intended to declare more heirs; I do not think that Servius himself meant anything else.

26 GAIUS, *Provincial Edict, book 22:* When a person is declared by a statute to be *intestabilis*, the effect is that he is not acceptable as a witness and furthermore, in the view of some, that witnesses cannot act for him either.

27 CELSUS, *Digest, book 15:* Domitius Labeo to Celsus, his friend, greetings. I ask you whether a person who, when he had been asked to write a will, also sealed the will when he had written it, is to be regarded as one of the witnesses. Juventius Celsus to Labeo, his friend, greetings. I do not understand what it is that you have consulted me about, or else your consultation is really stupid; for it is more than ridiculous to doubt whether someone has been lawfully used as a witness, when he also wrote the will.

28 MODESTINUS, *Rules, book 9:* A slave, even if he belongs to someone else, is not prohibited from writing a will on the instructions of the testator.

29 PAUL, *Replies, book 14:* On the basis of a writing, which was being prepared in order to make a will, not even those provisions which are framed as *fideicommissa* can be claimed, if the will had not been completed in any lawful way. 1. From the follow-

ing words, which a head of a household added in writing, "I wish this my will to have effect in any circumstances," [I replied that] it appeared that he had wanted the provisions which he left to have effect in any case, even if he had died intestate.

30 PAUL, *Views, book 3:* It has been agreed that each of the individual witnesses who are used for a will must note in his own handwriting who has sealed and whose will he has sealed.

31 PAUL, *Views, book 5:* The property of a person who had boasted that he would make the emperor be his heir cannot be seized by the imperial treasury.

2

THE INSTITUTION OF CHILDREN AND *POSTUMI* AS HEIRS AND THEIR DISHERISON

1 ULPIAN, *Sabinus, book 1:* Let us see what it means to disinherit "by name." Are the person's *nomen*, *praenomen*, and *cognomen* to be stated, or is even one of these enough? And it is agreed that one is enough.

2 ULPIAN, *Rules, book 6:* A son is also regarded as disinherited "by name" if he is disinherited thus: "Let my son be disinherited," even if his name has not been used expressly, provided that he is an only son; for if there are several sons, by a favorable interpretation the reply given by most jurists is rather that none has been disinherited.

3 ULPIAN, *Sabinus, book 1:* Even if he [a father] has refrained from saying "son" but has said, "the child born of Seia," he makes a proper disherison; and if he has indicated the son with an insult such as "the person not to be named" or "the person who is not my son," "robber," "gladiator," the better view is that the son has been properly disinherited, even if he has said, "the one born in adultery." 1. However, Julian thinks that a son ought to be disinherited unconditionally, and this is the view which we follow. 2. The disherison of a son may also properly be made among the institutions of the heirs and will be excluded from every degree of heirs, unless perhaps the testator disinherited him with respect to one heir only; for if he did this, the disherison will be defective, just as if he disinherited him thus: "Whoever becomes heir to me, let my son be disinherited"; for as Julian writes, a disherison of this sort is defective, because he wanted him to be excluded after acceptance of the inheritance, which is impossible. 3. A person disinherited before the institution of an heir is excluded from every degree. 4. However, a person disinherited between two degrees is removed from both in the view of Scaevola, which I think to be the true one. 5. In the case of someone who intermingled two degrees, Mauricianus rightly thinks that the disherison is valid, as, for example: "Let Primus be heir to the extent of a half. If Primus should not be heir, let Secundus be heir to the extent of a half. Let Tertius be heir to the extent of the other half. Let my son be disinherited. If Tertius should not be heir, let Quartus be heir"; for he [the son] has been excluded from both degrees. 6. If the head of a household has made a will in such a way that he simply passed over his son in the first degree of heirs and disinherited him only from the second degree, Sabinus, Cassius, and Julian think that discarding the first degree, the will takes its beginning from the degree from which the son has been disinherited; and this view has been approved.

4 ULPIAN, *Sabinus, book 3:* It is settled that any male person can appoint a *postumus* as heir, whether he is already a married man or has not yet taken a wife; for a married man can divorce his wife and someone who has not taken a wife can later become married. For even when a married man appoints a *postumus* as heir, it is certainly not that *postumus* only who has been born to him from the woman whom he had as his wife at that time, or who is then in the womb, who is regarded as appointed, but also a *postumus* born of any wife he may have.

5 JAVOLENUS, *From Cassius, book 1:* And, therefore, if someone who has instituted a *postumus* as heir has entered into another marriage after making the will, a child who has been born of the later marriage is regarded as having been instituted.

6 ULPIAN, *Sabinus, book 3:* But the question is asked whether someone who cannot easily father children can make a *postumus* heir. And Cassius and Javolenus write that he can; for he can take a wife and adopt. Both Labeo and Cassius write that an impotent person also can appoint a *postumus* as heir, because neither age nor sterility is an impediment to that. 1. But if he has been castrated, Julian, following the opinion of Proculus, thinks that he cannot institute a *postumus* as heir, which is the law we apply. 2. A hermaphrodite, though, will be able to institute a *postumus* as heir, if the male characteristics in him are predominant.

7 PAUL, *Sabinus, book 1:* If a son who is in power has been passed over and dies in the lifetime of his father, the will is not valid, nor is a previous will broken, and this is the law we apply.

8 POMPONIUS, *Sabinus, book 1:* If, having instituted Primus as heir, I disinherited my son, but did not disinherit him in respect of Secundus, the substitute heir, and while it is uncertain whether the former will accept the inheritance, my son dies, according to the view which we follow Secundus will not be heir, as having been invalidly instituted from the start, since my son was not disinherited in respect of him. But if the same has happened in the case of a *postumus* son, namely, that having been born in the lifetime of his father, the person in respect of whom he was disinherited dies, the same will have to be said with regard to the substitute, because when the son is born, he is in the position of a surviving son.

9 PAUL, *Sabinus, book 1:* If a person institutes as heirs *postumi* whom he may perhaps be unable to have because of age or ill-health, his previous will is broken, because in the matter of fathering children, regard should be had rather to nature and to the usual state of affairs than to a defect resulting from the passing of time or to ill-health by which a man is deprived of the power of fathering children. 1. But if a person has instituted as heir a *postumus*, born of a woman who is married to someone else, the institution is invalid by operation of law, because it is immoral. 2. If I have disinherited my son and, passing over my grandson by him, have instituted someone else as heir and my son has survived after my death, Julian, Pomponius, and Marcellus say that although he died before the inheritance was accepted, nevertheless, my grandson will not break the will. And it is different if the son is in captivity and died in that state; for in these cases, the grandson does break the will, because on the death of the grandfather, the right of the son is in suspense and not cut off as it was in the previous case. But also if the instituted heir should not accept the inheritance he will be *legitimus heres*, because the words "if there is a death intestate" are referred to the time at which the will is abandoned, not to the time of death. 3. But if I have instituted as heir a *postumus* born of a woman whom it is improper to take as a wife, Pomponius does not think that the will is broken. 4. But if I have a sister by adoption, I will be able to institute as heir a *postumus* born of her, because if the adoption is ended, I can take her as my wife.

10 POMPONIUS, *Sabinus, book 1:* A person not yet born is most suitably instituted as heir by the following formula: "If a child is born to me either in my lifetime or after my death, let him be heir," or even unconditionally, making mention of neither time. If either event has been omitted and a child is born in the event which has been omitted, he breaks the will, because this son is not regarded as being even conditionally appointed as heir, being born in the very event which has not been covered by the will.

11 PAUL, *Sabinus, book 2:* In the case of *sui heredes*, it is more clearly evident that the continuation of ownership leads to this, that no inheritance is regarded as having taken place, as if they were already owners, being thought of as in some sense owners even in the lifetime of the father. And so a son-in-power is even called the same as a head of the household with the addition only of a qualification which makes a distinction between the person who fathers and the person who is fathered. Therefore, after the death of the father they are not regarded as taking up an inheritance, but rather

get free power of administration of the property. For this reason, even if they have not been instituted heirs, they are owners; and it is no objection to say that it is permissible to disinherit them, because it was also permissible to kill them.

12 ULPIAN, *Sabinus, book 9:* When it is said that the birth of a son breaks a will, by "birth" understand even one born by Caesarean section; for he also breaks the will, if, that is to say, he is born in his father's power. 1. But what if an incomplete creature has been born, but living, will even this break the will? And it breaks the will all the same.

13 JULIAN, *Digest, book 29:* If a will was drawn as follows, "if a son is born to me let him be heir in respect of two thirds, let my wife be heir in respect of the remaining part; but if a daughter is born to me, let her be heir to the extent of a third; let my wife be heir in respect of the remaining part," and both a son and a daughter were born the decision must be that the whole inheritance should be divided into seven parts, so that the son gets four of them, the wife two, and the daughter one; for in this way, in accordance with the wishes of the testator, the son will have as much more again as the wife and the wife as much more again as the daughter; for although it was agreed that by a nice rule of law the will was broken, yet, as the testator wished his wife to have something against both children, humanity suggested that a decision of this kind should be reached, which very clearly had the approval also of Juventius Celsus. 1. There is a rule of the civil law by which it is laid down that an inheritance once given cannot be taken away in accordance with which a slave declared to be free and heir, although his master has taken away his freedom again in the same will, nevertheless will have both his freedom and the inheritance. 2. A will which is drawn in this fashion, "let Titius be my heir after the death of my son; let my son be disinherited," is of no effect, because the son has been disinherited after his death; and hence, a son in this position will be able to obtain *bonorum possessio contra tabulas* in respect of the wills of his father's freedmen also.

14 AFRICANUS, *Questions, book 4:* If a *postumus* has been disinherited with respect to heirs in the first degree and passed over in respect of those in the second degree, although he is born at a time when the inheritance is open to the heirs named in the first degree, it is settled that the institution in the second degree is still vitiated to the effect that if the institutes should reject the inheritance, he himself will become heir. Indeed, even if he should die and the instituted heirs should not accept the inheritance after his death, the substitutes cannot accept the inheritance. Therefore, if he has been disinherited with respect to heirs of the first degree, passed over with respect to those of the second, and disinherited with respect to those of the third, and he dies while those of the first degree are alive and considering whether to accept the inheritance, it is also commonly asked whether, if those of the first degree should not accept the inheritance, the inheritance opens to those who have been named in the third degree or rather to the *legitimi heredes.* And in this very case, he [Julian] thought that the more correct view is that it opens to the *legitimi*; for when two heirs have been instituted and a separate substitution has been made in place of each of them and a *postumus* has been disinherited with respect to the first [the institutes] and passed over with respect to the second [the substitutes], if one of the institutes does not accept, although the *postumus* is excluded, nevertheless, the substitute is still not admitted. 1. The common saying, that an institution as heir in any degree in respect of which a son has been passed over is not valid, is, he [Julian] says, not true in every conceivable case; for if a son has been instituted heir in the first degree, he ought not to be disinherited with respect to the substitutes; and, therefore, if, when a son and Titius have been instituted heirs, Maevius has been substituted to Titius, if Titius does not accept the inheritance, Maevius can accept it, although the son has not been disinherited in the second degree. 2. If someone has written the following, "let him, whom I know is not born of me, be disinherited," he [Julian] says that this disherison is of no moment, if he [the son] is proved to have been born of him [the testator]; for he does not appear to have been disinherited as a son. When a father had made a statement about his son when he was disinheriting him and had added that he was disinheriting him for that reason, and it is proved that the father was in error about the reason for the disherison, it is the same.

15 ULPIAN, *Sabinus, book 1:* It is the same even if he said the following: "Let him, the son of that other person, be disinherited," erroneously ascribing to him an adulterer as father.

16 AFRICANUS, *Questions, book 4:* If a son has been instituted heir, omitting any *postumus*, and substituted to the son is a grandson born of him, if the son dies in the meantime, should no *postumus* be born, the grandson will be *suus heres* both to his father and to his grandfather. But if no one has been substituted to the son and he alone has been instituted, then, because at the time when he dies it becomes certain that no one will be heir under that will, the son himself will become heir to his intestate father, just as usually happens when a son who has been instituted heir under a condition which it will be in his own power to fulfill, dies before he fulfilled it.

17 FLORENTINUS, *Institutes, book 10:* Sons are also disinherited in the following way: "My son is to be disinherited"; "my son will be disinherited."

18 ULPIAN, *Edict, book 57:* Many men disinherit their sons not as a mark of disgrace nor to prejudice them, but so as to provide for their interests, as, for example, where they are *impuberes*, and they give them the inheritance by *fideicommissum.*

19 PAUL, *Vitellius, book 1:* When a certain man had named his daughter heir to his whole inheritance and left ten to his son, whom he had in power, he added "and for the remaining part he will be disinherited with respect to me," and it was asked whether he [the son] was to be regarded as having been correctly disinherited, Scaevola replied that he was not. In the course of a disputation, he added that the reason for the invalidity of the disherison was that someone declared to be disinherited in respect of a landed estate was not correctly disinherited and that the case of an institution, which would be favorably construed, was different; disherisons, however, were not to be assisted.

20 MODESTINUS, *Encyclopaedia, book 2:* If a son, instituted heir under condition, has given himself in adrogation while the condition is outstanding, he will not be *necessarius heres.*

21 POMPONIUS, *Quintus Mucius, book 2:* If I have disinherited a son by name and afterward institute him heir, he will be heir.

22 TERENTIUS CLEMENS, *Lex Julia et Papia, book 17:* If, when a *postumus* is instituted under a condition, the condition is realized before he is born, the will is not broken by the addition of a *postumus* to the agnatic family.

23 PAPINIAN, *Questions, book 12:* I said that a disherison previously made operated against a son whom his father adopted by *adrogatio* again after he had emancipated him; for throughout almost the whole law it is settled that the rule to be observed is that a son is never to be regarded as an adoptive son of his true father lest the truth be obscured through an imitation of nature, that is to say, he should not be regarded as having been transferred, but as having been returned; and, so far as the instant case is concerned, I do not think that it matters much that he adopted his disinherited son as a grandson. 1. If Titius, having been instituted as heir, is adopted as a grandson, should the son who was regarded as father afterward die, the will is not broken by the succession of a grandson in the person of one who is found to be heir.

24 PAUL, *Questions, book 9:* If a *postuma*, who has been instituted heir under a condition, is born in the lifetime of her father while the condition is outstanding, she breaks the will.

25 PAUL, *Replies, book 12:* Titius instituted an heir in his will, and, having a son, he put in a disherison clause as follows: "Let all the others, sons and my daughters, be disinherited." Paul replied that the son was to be regarded as correctly disinherited. Consulted afterward, whether a son whom his father thought had died was to be regarded as disinherited, he replied that sons and daughters are disinherited by name on the facts set forth; however, an action ought to be brought before a judge with regard to the error of the father which is said to have taken place. 1. When Lucius Titius was settling his last dispositions in the city and had a granddaughter through his daughter in the country who was pregnant, he appointed what she had in her womb as heir in respect of part of the inheritance. I ask whether the institution of their heir is valid, when on the very day when Titius was making out his will in the city at midday, on the same day at the break of dawn Maevia gave birth to a male child in the country, because, at the time when the will was being written, the birth had already taken place. Paul replied that the words of the will did indeed appear to be directed to a great-

grandchild who should be born after the will was made; but if, as the facts state, the granddaughter of the testator had given birth on the same day as the will was made before the will was written, although the testator did not know, yet the correct reply to be given was that the institution was to be regarded as lawfully made.

26 PAUL, *Views, book 3:* If a son-in-power is on military service, he ought to be either appointed as heir or disinherited by his father, by name, as if he were a civilian, because the edict of the deified Augustus in which it was laid down that a father should not disinherit his soldier son has now been repealed.

27 PAUL, *Neratius, book 3:* He [a testator] can institute as his heir a *postumus* born to him from anyone who may be his widow.

28 TRYPHONINUS, *Disputations, book 20:* A son, instituted as heir by his father in whose power he is under a condition which it is not in his own power to fulfill and disinherited on failure of the condition, died while the condition both of the institution and of the disherison was still outstanding. I said that he had died as heir on intestacy, because, while he is alive, he has neither been heir by will nor disinherited. However, if the son has been appointed as heir in part, his co-heir can be instituted after the death of the son. 1. A son-in-power who was a soldier and had a son under the power of the same head of the household made a will of his *peculium castrense.* When he had ceased to be in military service with his father and his grandfather on the same side dead, it was asked whether his testament will be broken. He has not, after all, adopted, nor has a son been born to him today, nor when an earlier *suus heres* has been removed from his power, has a later one succeeded in the next place; yet he has begun to have in his power someone whom he did not have, and at the same time he has become head of a household, and his son has fallen back into his power; therefore, his testament will be broken. But if that son of his has been instituted as heir or disinherited, it [the will] is not broken because he obtained parental power not by any new action affecting him, but by a certain natural order of things. 2. If someone appoints a child born of a particular wife as his heir, he places his will at risk of being broken by children whom he has by another wife. 3. If someone, as testator, has appointed as heir a child born from a woman at a time when she could not yet be his wife, the question is asked whether the child born afterward when a lawful marriage had been contracted can be heir under the will; for example, if you today appoint an heir born to you by Titia, when Titia [is] a slave-girl or a girl under twenty-five years of age to whom your father acted as tutor or whose tutor you yourself were, and afterward Titia became your lawful wife, either having gained her freedom or at the age of twenty-five and by showing that an *annus utilis* has passed and accounts have been produced, can the child born be heir? Certainly, no one will doubt that the child of Titia, who could not be taken as wife because of the state of her age when the will was being made, born afterward when she had been taken as wife, can be heir. And generally speaking, if the named heir appointed is born after the will, there is the possibility of his having the inheritance, whatever may have been the status at the time of making the will of the woman who afterward lawfully married the testator. 4. But what if he appointed a son born after the will as heir to two thirds, but a daughter born after the will to a third and he did not either name any co-heir or substitute anyone else in turn? If only one is born, he [or she] will become heir under the will.

29 SCAEVOLA, *Questions, book 6:* Gallus argued that grandchildren *postumi* could be instituted as follows: "If my son dies during my lifetime, then if any grandson or any granddaughter is born to me through him after my death in the ten months next after the time of my son's death, let them be heirs." 1. Certain jurists rightly think that it should be accepted that even if he [the testator] does not expressly mention the death of his son, but simply institutes [his grandchildren], in that case the institution is valid, as that result can be constructed from the words used. 2. One must accept that Gallus took the same view in the case of a great-grandson also, as where the testator says: "If my grandson dies during my lifetime, then if any great-grandson through him" and so on.

3. But even if he were to make a will when his son was still alive but his grandson, whose wife was pregnant, was dead, he can say: "If my son dies during my lifetime, then any great-grandson." 4. If both son and grandson are alive, [could he] frame the will: "If both should have died during his lifetime, then any great-grandson who should be born?" And this similarly is admissible, provided, that is, that the grandson died first and then the son, so that the will was not broken by their succession. 5. And what if he framed the will for the case of the death of the son only? For what if he should suffer interdiction from fire and water? What if the grandson, the great-grandson through whom was instituted, as we have proposed, should have been emancipated? For these cases and all those in which a *suus heres* might be born, after the death, that is, of the grandfather, are not dealt with in the *lex Vellea*; but following out the intention of the *lex Vellea* all these things are to be admitted also, so that the other cases are to be admitted on the analogy of death. 6. What if someone who had a son in captivity should make a will? Why did they not argue that if the son were to die before he could return from captivity, although he died after the death of his father, then a grandson were to be born after the death, namely of the grandfather, even while those were still alive, he would not break [the will]? For this case is not dealt with in the *lex Vellea*. Therefore, the better policy is that for the benefit of cases of that sort, especially after the *lex Vellea*, which also removed many occasions for breaking [a will], the interpretation be admitted that someone instituting a grandson who would be born to him as his *suus heres* after his death should be regarded as having instituted him correctly, whatever the cases in which the grandson might have been born as his *suus heres* after his death and would break [the will] if passed over; and even if he should have been instituted in general terms, such as "whatever children [descendants] shall be born to him after his death" or "whoever shall be born," if he would be born a *suus heres*. 7. If the daughter-in-law of someone who has a son and institutes a grandson born of him has been captured by the enemy when pregnant and there gives birth in the testator's lifetime and then he [her child] returns after the death of his father and grandfather, does this case fall under the *lex Vellea*, or is it to be referred to the old law, and can the institute avoid breaking [the will] either under the old law or under the *lex Vellea*? And this must be asked where he institutes his great-grandson after the death of his son and he returns after his [the testator's] death. But as the will is not broken by him, it does not matter whether this is excluded under the old law or under the *lex Vellea*. 8. Perhaps someone may be inclined to doubt whether in those cases, if the grandson is born after the will in the lifetime of his father, and then a child is conceived of him and he [the child] is born in the lifetime of

his father after the death first of his grandfather, then of his father, then of his great-grandfather, he could not have been instituted heir, because his own father had not been correctly instituted. And there is no need at all for alarm about this; for he is born a *suus heres* and is born after the death. 9. Therefore, that great-grandson also will be admitted who is afterward born to a grandson in the lifetime of a son as if he had been born to him after his adoption. 10. In all these cases, the rule to be observed is that at least a son who is in power has been instituted heir for some share; for there will be no point in disinheriting him after his death; and that this is not necessary in the case of a son who is in captivity, if he dies there, nor certainly in that of a grandson and a great-grandson, whose institution we will never require if the children are instituted heirs, because they can be passed over. 11. Now let us consider the *lex Vellea*. It intended that those born during our lifetime likewise should not break a will. 12. And the first chapter appears to deal with those who, when they were born, would be *sui heredes*. And I ask: What if you have a son and you institute as heir only a grandson through him not yet born, your son dies, and then a grandson is born during your lifetime? From the words [of the statute], it must be said that the will is not broken, so that in the first chapter it provided not only for the case where a grandson is instituted at a time when there is not a son but also for the case where one is born in the lifetime of his father; for what necessity is there to have regard to the time of making the will when it is enough to look at the time when the birth occurs? For although the words are as follows: "a man who proposes to make a will, all of the male sex, who will be *suus heres* to him, he" and so forth. 13. In the following part, [the statute] intends that those succeeding in the place of children should not break the will, even if they are born in the lifetime of the parent, and it is to be interpreted in such a way that if you have a son, a grandson, and a great-grandson, if both [the others] are dead the great-grandson, if instituted, succeeding in place of the *suus heres*, does not break [the will]. And the words "if any of the *sui heredes* has ceased to be *suus heres*" are well conceived to cover all those cases which we said required to be supplied in the opinion of Gallus Aquilius, and not only if a grandson dies in the lifetime of his father, does a great-grandson succeeding to him on the death of the grandfather not break [the will] but even if he survived the father and dies, provided that he was instituted heir or disinherited. 14. It must be considered whether from this later part, "if any of the *sui heredes* has ceased to be *suus heres*, his children" and so forth, "succeed as *sui heredes* in place of the *sui*," it can be argued by interpretation, that if you, who have a son in captivity, institute a grandson through him as heir, not only if your son dies during your lifetime but even if he does so after your death before he has returned from captivity, will the grandson by succeeding not break [the will]; for it did not add anything to specify the time, except that you can say, albeit boldly, that he had ceased to be *suus heres* in the lifetime of his father, although he dies after his death, because he did not return nor can return. 15. This case is difficult: If you have a son

and institute a grandson not yet born and he is born in the lifetime of his father and then the father dies; for he is not *suus heres* at the time when he is born, nor does another later person than one who has already been born seem to be prohibited from breaking [the will] by succeeding. Moreover, by the previous chapter it is permitted that those not yet born, who will be *sui* (*heredes*) when they are born, are allowed to be instituted; in the later chapter [the statute] does not permit the institution, but forbids [the will] to be broken and the fact that he succeeds from preventing its confirmation. Certainly, it ought to result that he has been effectively instituted, which someone who had not yet been born could not in any way lawfully be. And yet it would appear that Julian thought that putting the two chapters of the statute together, as it were, the statute could be read in this sense also, so that wills are not broken. 16. But as Julian's opinion has been accepted, let us ask whether, if a grandson is born in the lifetime of his father, and then is emancipated, he can voluntarily accept the inheritance. And this seems rather the better view to take; for by the emancipation he could not become *suus heres*.

30 GAIUS, *Provincial Edict, book 17:* Among all the other things which it is essential to look for in drawing up wills the main legal provisions are those concerning the institution of children as heirs or their disherison, so that the will is not broken because they have been passed over; for if a son who is in power has been passed over, the will is invalid.

31 PAUL, *Sabinus, book 2:* While his son is in captivity a father has lawfully made his will although he passes him over, when if the son were in power, the will would have been totally invalid.

32 MARCIAN, *Rules, book 2:* If, when an emancipated son has been disinherited, one who is in power has been passed over, the emancipated son himself, if he seeks [*bonorum possessio*] *contra tabulas*, will, of course, achieve nothing; however, both the *suus* [*heres*] and the emancipated son will have a claim on intestacy.

3

A WILL WHICH HAS NOT BEEN LAWFULLY MADE, OR WHICH HAS BEEN BROKEN OR RENDERED INEFFECTUAL

1 PAPINIAN, *Definitions, book 1:* A will is said to be not lawfully made, where the legal solemnities have not been observed; or to be of no effect, when a son who was in his father's power has been passed over; or it is broken by another will under which there can be an heir or by the addition of a *suus heres* to the agnatic family; or it is rendered ineffectual by the nonacceptance of the inheritance.

2 ULPIAN, *Sabinus, book 2:* However, an earlier will is only broken when a later one has been duly completed, unless, perhaps, the later one has been made under military law or the person appointed [heir] in it is someone who can claim on intestacy; for then the previous one is broken even by a later one which is not [duly] completed.

3 ULPIAN, *Sabinus, book 3: Postumi* who are descendants through the male line must be disinherited by name in the same way as sons, so that they do not break the will by addition to the agnatic family. 1. However, we call *postumi* only those who are born after the death of their parent. But even those who are born in the lifetime [of the parent] after the will has been made are only prohibited by the *lex Vellea* from breaking the will if they have been disinherited by name. 2. And, hence, they can be disinherited even before the institution of the heir or in the middle of the institutions of heirs or between degrees [of heirs]; for the deified Marcus decreed that the same rule was to be maintained in the case of a *postumus* as in that of a son, and no reason can be given for making a distinction. 3. From this it is apparent that the case of surviving sons is one thing and that of the later sons is another: The former make [the will] unlawful, the latter break it; the former always, the latter if they are born and do not find themselves disinherited. 4. But even if before this one there is another will in respect of which a *postumus* has been disinherited, it is agreed that whether he is born after the death of the testator or in the lifetime of the testator both wills are broken, the early one by the later one and the later one by the *post-*

umus. 5. However, a *postumus* is regarded as disinherited by name whether he [the testator] has said, "whoever should be born to me" or "from Seia" or "let the womb be disinherited." But even if he said, "let a *postumus* be disinherited," one born either after the death or in the lifetime of the testator will not break [the will]. 6. However, even although a *postumus* who has been passed over breaks [the will] by becoming a member of the agnatic family, it sometimes happens that [only] part of the will is broken, as, let us say, if you put the case of a *postumus* disinherited in the first degree, passed over in the second; for here the first degree is valid, the second is broken.

4 ULPIAN, *Disputations, book 4:* Finally, even if the heirs appointed in the first degree are considering [whether to accept the inheritance], those appointed as heirs in the second degree cannot obtain the inheritance; for if a degree is broken and avoided, the inheritance cannot be obtained from it any more.

5 ULPIAN, *Sabinus, book 3:* For even if someone in respect of whom a *postumus* has not been disinherited has been instituted heir under a condition, still [the institution in that] degree is broken while the condition has still to be satisfied, as Julian also wrote; but even if someone has been substituted to him, even if the condition imposed on [the institution in] the first degree is not satisfied, the substitute will not be admitted, where, namely, a *postumus* has not been disinherited in respect of him. I think, therefore, that even if the condition imposed on the [institution in the] first degree is satisfied, room will rather be made for the *postumus*; but a *postumus* born after failure of the condition does not break the institution in that degree because it is null. But by breaking the will a *postumus* normally makes room for himself, although a son allows [an institution in] a following degree, in respect of which he has been disinherited, to stand. But a *postumus*, if he has been passed over in respect of the first degree and disinherited in respect of the second, if he is born at a time when any of the institutes is alive, the whole will is broken; for by removing the first degree, he makes room for himself.

6 ULPIAN, *Sabinus, book 10:* If someone has died, having disinherited his son and with his daughter-in-law left pregnant, and he has instituted an *extraneus* under a condition and the disinherited son has died while the condition is not yet satisfied, after his father's death or while the instituted heir is considering whether to accept the inheritance, and a grandson has been born, does he break the will? And we shall hold that the will is not broken, as such a grandson, who is preceded by his father, did not have to be disinherited by his grandfather. Clearly, if it should happen that the institute does not enter on the inheritance, there is no doubt that this [grandson] will be *suus heres* to his grandfather on intestacy. Both [decisions] for their own reasons; for it is someone whom no one preceded at the time of the death who, by joining the agnatic family, breaks [the will]; but it is someone to whom the inheritance has been offered and whom no one else then precedes, who succeeds on intestacy; it is, however, apparent that the inheritance had not been offered to the son when he died while the institute was considering. But this applies if the grandson was in the womb at the time of his grandfather's death. But if he was conceived afterward, Marcellus writes that he cannot be admitted to the inheritance or to claim *bonorum possessio* either as *suus* [*heres*] or as a grandson or a cognate. 1. But if the father of someone who was in the womb at the time of his grandfather's death was in captivity that grandson, if his father should die while in the same condition, by coming in his father's place after the death of his grandfather will break the will, because the person above-named will not stand in his way; for he is regarded as not having been in existence, when he dies in that condition, although a captive returning would make his father's will unlawful if he were passed over in it. 2. However, whether the grandson has been conceived when his father was within the *civitas* or was in captivity, by coming in his father's place he breaks the will, because *postliminium* is granted to issue also. 3. By coming in a predecessor's place, therefore, *sui* [*heredes*] do not break the will, whether they have been instituted or disinherited in respect of [institutes in] the degree to which the inheritance opens, provided, namely, that [the institution in] that degree is valid. 4. However, whatever the way in which their parents preceding them ceased to be in power, the children coming in their place, if they have been instituted or disinherited, will not break the will, whether it was by captivity, or by

death or by punishment. 5. A will is rendered ineffectual whenever something has happened to the testator himself, let us say, if he loses citizenship through falling into slavery, for example, by being captured by the enemy or if, being more than twenty years old, he has allowed himself to be sold with a view to performing an act or sharing in the price. 6. But even if someone has been condemned to capital punishment, to fight with beasts or to be beheaded, or condemned to another punishment which deprives him of life, his testament will become ineffectual and that not as at the time when he is killed, but when he comes under sentence; for he is made a *servus poenae*, unless perhaps he was a soldier condemned for a military crime; for such a soldier is usually allowed to make a testament as the deified Hadrian provided in a rescript, and I think the testament will be made under military law. And, therefore, if he has been given permission to make a testament, if he had any testament made previously, will the previous testament be valid for the same reason that he is allowed to make a testament after he has been condemned? Or having been made ineffectual by the punishment imposed, must it really be made afresh? And if he is to make a testament by military law, there ought to be no doubt that if he intended it to stand, he is regarded as having done so. 7. The will of someone who is deported will not be made ineffectual immediately, but when the emperor has confirmed the act; for it is then also that he suffers a change of civil status. But even if the governor has given an interlocutory judgment referring to the emperor the question of punishment of a decurion or his son or grandson, I do not think that [the person in question] is made a *servus poenae* immediately, although they are usually taken into prison for more secure custody. Therefore, the testament of such a person will not be made ineffectual before the emperor has replied that he should be executed; and, hence, if he has died before this, his testament will certainly be valid, unless he committed suicide. For *constitutiones* make ineffectual the wills of those who have chosen to die rather than be condemned, on account of their consciousness of having committed a crime, although they die still citizens; but if someone [chooses to die] because tired of life or unable to bear ill-health or as a gesture, like some philosophers, their situation is such that their wills are valid. And in a letter to Pomponius [Pompeius] Falco, the deified Hadrian laid down that this distinction applied to a soldier's will also, so that if he chose to die on account of his consciousness of having committed a military crime, his will should be ineffectual; but if it was because he was tired of life or because of pain, his will is valid, or if he died intestate, his [belongings] are to be claimed for his cognates, or if there are none, for his legion. 8. However, all those, whose wills we have said are made ineffectual by condemnation for crime, do not change their civil status if they have appealed, and, therefore, wills which they have made previously are not rendered ineffectual, and they could then make a will; for this has very often been laid down by *constitutio*, and they will not be regarded as not having *testamenti factio*, as being in doubt about their status; for they have a definite status and are not themselves uncertain about their status in the meantime. 9. But what if the governor has not accepted an appeal, but postponed punishment by writing to the emperor? I think that such a person also retains his status in the meantime, and his will is not made ineffectual; for, as is set out in a speech of the deified Marcus [to the senate], even if the appeal of the appellant or the person on whose behalf the appeal is made has not been accepted, punishment is to be deferred until the emperor has replied to the governor's letter and the petition of the accused sent with the letter unless, perhaps, a robber caught in the act, or an outbreak of sedition and savage violence, or some other just cause, which the governor will immediately justify in his letter, does not brook delay, not by hastening the punishment, but in order to prevent danger; for in those circumstances it is permissible to punish and then write. 10. What if someone has been illegally condemned but punishment has not yet been inflicted? Let us consider whether his will becomes ineffectual; let us say a decurion [is condemned] to fight with beasts, is his civil status changed, and does his will become ineffectual? And I do not think so, as the

sentence did not take effect on him. Therefore, if someone has condemned a person who was not subject to his jurisdiction, the condemned person's testament will not be ineffectual either, as has been laid down by *constitutio*. 11. But those whose memory has been condemned after their death, let us say because of their *majestas* or for some other such reason, do not even have their wills upheld but these will become ineffectual. 12. But to what we have said about the will of someone captured by the enemy becoming ineffectual must be added that if he has returned with *postliminium*, it comes into force again by right of *postliminium*, or if he dies a captive, it is confirmed by the *lex Cornelia*. Therefore, if someone condemned to capital punishment has been restored to his former position by the mercy of the emperor, his will also will be validated again. 13. It is settled that the will of a son-in-power who is a veteran and is made independent by the death of his father does not become ineffectual; for so far as making a will of his *peculium castrense* is concerned, he is to be regarded as head of a household, and, therefore, it is true that the will of a soldier or a veteran is not made ineffectual even by emancipation.

7 ULPIAN, *Sabinus, book 10:* If a soldier has made a testament in accordance with civil law and appointed heir in the first degree a person whom he could so do in accordance with military law and heir in the second degree someone whom he could so do by the general law and has died after a year from his discharge, the [institution in the] first degree will become ineffectual, and the testament will begin from the [institution in the] second degree.

8 ULPIAN, *Sabinus, book 11:* It is true that a will is broken by the adoption or *adrogatio* of a son or daughter, because it is usually broken by the addition of a *suus heres* to the agnatic family. 1. When a daughter is emancipated or a grandson, they do not break the will because they leave parental power by a single *mancipatio*.

9 PAUL, *Sabinus, book 2:* If a father is captured by the enemy while his son remains in the *civitas*, on his return his will is not broken.

10 PAUL, *Vitellius, book 1:* But a son returning with *postliminium* does not break his father's will either, as Sabinus thought.

11 ULPIAN, *Edict, book 46:* If two wills are produced, made at different times, the one earlier and the other later, but both sealed with the seals of seven witnesses, and the later one when opened is found to be blank, that is, having nothing at all written on it, the former will is not broken because the subsequent one is null.

12 ULPIAN, *Disputations, book 4:* A *postumus*, who had been passed over, having been born in the lifetime of the testator, died; although by the strictness and undue nicety of the law the will is regarded as broken, still, if the will has been sealed, the heir appointed can claim *bonorum possessio secundum tabulas* and will obtain the estate, as both the deified Hadrian and our emperor laid down by rescript, and therefore, the legatees and beneficiaries by *fideicommissum* will have what was left to them secure. The same will have to be held with regard to a will which is unlawful or made ineffectual, if *bonorum possessio* has been given to the person who can take the estate on intestacy. 1. If a civilian, who already had a will, had made another one and had included in it a provision committing to the heir's good faith that he maintain in effect the earlier will, the earlier will is entirely broken; and as it is broken, the question can be asked whether it ought to stand in place of a codicil. And as this is the wording of a *fideicommissum*, there is also no doubt that everything which is written there will fall under a *fideicommissum*, not only the legacies and *fideicommissa* but also the grants of freedom and the institution of the heir.

13 GAIUS, *Institutes, book 2:* Like *postumi* also are those, who by coming in place of a *suus heres*, become *sui heredes* to their parents, as if by joining the agnatic family. As, for instance, if I have a son and a grandson or granddaughter through him in power, because the son is nearer in degree, he alone has the rights of a *suus heres* although the grandson and the granddaughter through him are also in the same power; but if in

my lifetime my son dies or for any reason leaves my power, the grandson or granddaughter now comes in his place, and in this fashion they acquire the rights of *sui heredes*, as if by joining the agnatic family. And, therefore, so that this does not break my will in this way, just as I ought to institute my son himself as heir or disinherit him, by name, lest I make my will unlawfully, so I must institute my grandson or granddaughter through him as heir or disinherit them, so that it may not happen that the grandson or granddaughter by coming in place of my son, should he die in my lifetime, breaks the will as if by joining the agnatic family; and this has been provided by the *lex Junia Vellea*.

14 PAUL, *Assignation of Freedmen, sole book:* If a disherison has been made as follows, "if a child male or female should be born to me, let it be disinherited," if both are born, the will is not broken.

15 JAVOLENUS, *Letters, book 4:* A man whose wife was pregnant was taken captive; if a son is born, at what time is a will, made while the father had citizenship, broken? And if the son dies before the father, will the heirs appointed have the inheritance? I replied: I do not think that there is any doubt that by the *lex Cornelia*, which was passed to confirm the wills of those who had died in captivity, when the son is born the will of the man who is in captivity is immediately broken; it follows, therefore, that the inheritance will pass to no one in terms of that will.

16 POMPONIUS, *Quintus Mucius, book 2:* When we have instituted heir in a second testament someone who is alive, whether the institution is unconditional or conditional (provided that the condition could come about, although it has not done so), the former testament will be broken. However, it is of great importance what sort of a condition has been inserted; for the condition inserted may be framed with regard to the past or with regard to the present or with regard to the future. One inserted, framed with regard to the past, might read: "If Titius was consul"; and if this condition is true, that is, if Titius was consul, the heir is instituted so as to break the previous will; for then he would be heir as a result of this. But if Titius was not consul, the former will is not broken. But if on the institution of the heir the condition is framed with regard to the present time, such as, "if Titius is consul," it has the same result, namely, that if he is, there can be an heir, and the previous will is broken; if he is not, there cannot be an heir, and the previous will is not broken. However, if conditions which have regard to the future are possible and could come about although they have not come about, they have the effect of breaking the earlier will even if they have not come about; but if they are impossible, such as, "if Titius touches the sky with his finger, let him be heir," it is settled that it is just as if the condition, which is impossible, had not been attached.

17 PAPINIAN, *Replies, book 5:* If a son who was in parental power has been passed over, neither do freedoms given stand nor are legacies paid if the son who has been passed over has claimed a share of the inheritance from his brothers; but if he has abstained from any dealings with his father's estate, although a nicety of the law seems to stand in the way, still the wishes of the testator will be upheld as a matter of fairness and equity.

18 SCAEVOLA, *Questions, book 5:* If a person who has been instituted heir is adopted by *adrogatio* by the testator, it can be held that he has been satisfactorily dealt with because even before he is adopted the institution had effect, as being that of an *extraneus*.

19 SCAEVOLA, *Questions, book 6:* If Titius and I have been instituted [heirs] and a *postumus* has been disinherited with respect to us but has not been disinherited with respect to our substitutes, if Titius has died, not even I will be able to accept [the inheritance]; for the will is already broken on account of the person of the institute in respect of whom the *postumus* has been disinherited and in whose place a substitute has been called in respect of whom the *postumus* has not been disinherited. 1. But if Titius and I have been substituted to one another, although he [the *postumus*] has not been disinherited in part of the substitution, if Titius has died or repudiates, I think

that I can accept [the inheritance] and will be heir to the whole inheritance. 2. But in the first case even if Titius is alive, neither I without him nor he without me will be able to accept, because it is uncertain whether the will may not be broken by the nonacceptance of the other of us; therefore, we can accept simultaneously.

20 SCAEVOLA, *Digest, book 13:* Lucius Titius made a will in the proper fashion when sound in mind and body, and afterward, when he had fallen ill, being mentally afflicted, he cut up the will; I ask whether the heirs instituted in this will can accept the inheritance. He replied that according to the facts set forth, [the inheritance] nonetheless could be accepted.

4

MATTERS WHICH ARE OBLITERATED, ERASED, OR WRITTEN OVER IN A WILL

1 ULPIAN, *Sabinus, book 15:* What can be read in a will, if it was unintentionally obliterated and erased, nevertheless stands, but if intentionally, it does not; certainly, what has been written, erased, or obliterated not on the instructions of the testator is as nothing. However, "be read" is to be taken not as meaning that what has been written can be understood but that it can be perceived with the eyes; but if it can be understood by external means, it is not regarded as being able to be read. However, it is enough if what is legible was unintentionally obliterated either by the testator himself or by someone else, not wishing to do so. "Erased" is to be taken as also covering words struck through. 1. Therefore, what was done incautiously is as if it had not been done, if it could be read; and, therefore, even if last of all, as is usual, there has been annexed to the will the words, "I myself made the corrections, erasures, and amendments," this will not be regarded as referring to those which happened unintentionally. And, hence, even if he has unintentionally written over them that he had made the erasures, they will remain, and provisions so taken out will not be taken out. 2. But if what has been unintentionally obliterated cannot be read, it must be held that it is not due, but this only if it was done before the completion of the will. 3. But those seeking to enforce provisions intentionally obliterated will be defeated by a defense, while those seeking to enforce provisions unintentionally obliterated will not be, whether the provisions can be read or cannot, because if the whole will is no longer extant, it is settled that everything which was written in it stands. And if indeed the testator spoiled it [the will], actions will be denied, but if it was someone else against the testator's wishes, they will not be denied. 4. And a part of the inheritance taken away or the whole inheritance, if there happens to be a substitute, will be regarded as lawfully dealt with, not as having been taken away, because an inheritance once given cannot easily be taken away, but as not having been given. 5. If a person has confirmed a codicil in his will and added something to the codicil, then obliterated it so that it can [still] be made out, is [the provision] due? And Pomponius writes that obliterated codicils are not valid.

2 ULPIAN, *Disputations, book 4:* A person had canceled his will or erased it and said he was doing so on account of one of the heirs; this will was later sealed. The question was raised whether the will was in force and what the position was regarding the share of the one on whose account he had said that he had canceled [it]. I held that if in fact he erased the name of one of the heirs, undoubtedly the remaining part of the will stood, and actions would be denied only to him; but legacies specifically charged on him will be payable if it was the wish of the testator that only the institution of the heir should be disapproved. But if he erased the name of the institute and left that of a substitute, the institute will not have the benefit of the inheritance. But if he erased all the names, as is proposed, but added that the reason why he did so was because he was offended with one of the heirs, I think it matters a great deal whether he intended to deprive only him of the inheritance or intended rather to nullify the whole will because of him, so that although one provided the reason for the erasure, still it prejudiced all of them. And, indeed, if he intended that a share should be taken away from him alone, the erasure will not prejudice the others at all, any more than if, intending to erase one heir, he unintentionally erased another one as well. But if he

thought that the whole will should be obliterated because of the demerits of one, all will be denied actions; but there is a question whether an action should be denied to the legatees. But in case of ambiguity, the interpretation to be adopted will be that the legacies are to be paid and also that the institution of the co-heirs is not to be nullified.

3 MARCELLUS, *Digest, book 29:* Very recently in a *cognitio* held by the emperor, when someone had erased the names of his heirs and his property was being claimed as caduciary by the imperial treasury, there was a long discussion about the legacies and especially about those legacies which had been assigned to those whose institution had been erased. The majority thought that the legatees also should be excluded. Which, indeed, should follow, I said, if [the testator] had canceled all the writing in the will; some think that by operation of law what has been erased is removed but all the rest will stand. What then? Is it not sometimes credible that someone who had erased the names of his heirs had thought that he would have done enough to bring about an intestacy? But, in a doubtful matter, to follow the milder interpretation is not only more just, but safer. The judgment of the Emperor Antoninus Augustus, in the consulship of Pudens and Pollio: "As Valerius Nepos, having changed his mind, both cut open his will and erased the names of his heirs, in accordance with a *constitutio* of my deified father, his inheritance is not regarded as belonging to those who were appointed [heirs]." And he said to the advocates of the imperial treasury: "The judges are for you." Vibius Zeno said: "I ask you, lord emperor, to hear me patiently: What do you decide with regard to the legacies?" The Emperor Antoninus said: "Does it seem to you that someone who erased the names of his heirs intended his will to stand?" Cornelius Priscianus, advocate of Leo, said: "He erased only the names of the heirs." Calpurnius Longinus, advocate of the imperial treasury, said: "It is not possible for any will to stand, which does not have an heir [in it]." Priscianus said: "He manumitted certain [slaves] and gave legacies." The Emperor Antoninus, having sent everyone away, when he had considered the matter and had ordered [them] to be admitted once more, said: "The present case seems to admit of a more humane interpretation, in that we think that Nepos intended that only those provisions which he erased should be ineffectual." 1. He erased the name of a slave whom he had ordered to be free. Antoninus in a rescript said that he [the slave], nevertheless, would be free; and the reason why he laid this down was in order to favor freedom.

4 PAPINIAN, *Replies, book 6:* Having had several tablets containing identical copies written, a testator at the same time completed in solemn form his wish that they form one will. If he took away and obliterated some of the tablets which had been deposited in public custody, what had been lawfully done will not be rendered ineffectual, especially when what took place is made clear from the other tablets which he did not take away. PAUL notes: But if he spoiled the tablets so that he would die intestate and those who wish to be admitted on intestacy have proved this, the inheritance will be taken away from the appointed [heirs].

5

THE INSTITUTION OF HEIRS

1 ULPIAN, *Sabinus, book 1:* A person who is making a will should generally start the will with the institution of the heir. It is also permissible to begin with a disherison which he makes by name; for the deified Trajan said in a rescript that it is possible to disinherit a son by name even before the institution of the heir. 1. However, we also call an instituted heir someone who has not been appointed in writing, but only by declaration. 2. A dumb or deaf person can properly be instituted heir. 3. Someone who does not propose to leave legacies and does not propose to disinherit anyone can make his will in five words, as by saying, "Lucius Titius be my heir"; however, what is written here relates to someone who is not making his will in writing. And he will be able to make his will even in three words, as by saying, "Lucius be heir"; for both "my" and "Titius" are superfluous. 4. If someone had been instituted sole heir in respect of

a landed estate, the institution is valid, cutting out mention of the estate. 5. However, if [the testator] writes, "Lucius heir," although he has not added "be," we accept that more was declared and less was written; and if as follows, "Lucius be," we hold the same; and, therefore, even if as follows, "Lucius," alone. Marcellus, not without nicety, takes the view that nowadays this is not acceptable. However, the deified Pius, when a certain person had made the distribution of shares [of the inheritance] among the heirs as follows, "so-and-so for a whole share, so-and-so for the whole" and had not added "be heir," said in a rescript that the institution was valid, and Julian also said the same. 6. Again, the deified Pius said in a rescript that an institution [in the form] "so-and-so my wife be" was valid although "heir" was lacking. 7. The same Julian did not think that "so-and-so to be heir" was valid because something [essential] is lacking; but that too will be valid, supplying, "I authorize."

2 ULPIAN, *Sabinus, book 2:* With respect to those who have been instituted heirs as follows, "in the shares which I shall specify," Marcellus does not think that they are heirs if no shares have been specified; [for it is] just as if they had been instituted heirs as follows, "if I specify shares for them." But it is better to take both institutions in the following sense, if the wishes of the deceased do not stand in the way, "in the shares which I shall specify, and if I do not specify any, in equal shares," as if a double institution had been made; and this view Celsus approves in the sixteenth book of his *Digest.* And this is different from the view that he approves in the case of the following institution: "Seius be heir in whatever share Titius has appointed me heir"; for, then, if he has not been appointed [heir] by Titius, Seius has not been appointed by him, and this is not unjustified; for in this case a condition is regarded as implied. But Marcellus thinks that these cases are similar. 1. However, it can matter whether someone writes, "in those shares which I have specified" or "[which] I shall have specified," in that where the former form is used you may hold that if no shares have been specified, the institution is null, as did Marcellus in the following: "Let them be heirs in the shares in which they had been appointed in their mother's will," [holding] that they were not instituted if their mother died intestate.

3 ULPIAN, *Sabinus, book 3:* A slave belonging to someone else can be instituted heir either in whole or in part without being given freedom. 1. If I have appointed my slave heir unconditionally and given him freedom under a condition, the institution [as heir] is deferred to the time at which freedom is given. 2. If a person has written the following, "if Titius shall be heir, let Seius be heir; let Titius be heir," the acceptance [of the inheritance] by Titius is awaited as a sort of condition, in order that Seius may be heir; and certainly, this is the view taken by Julian and Tertullian. 3. A person who has received his freedom under a *fideicommissum* subject to a condition can be instituted heir unconditionally with a grant of freedom by the heir and without waiting for the condition [to be fulfilled] will obtain freedom and the inheritance and in the meantime will be [*heres*] *necessarius*; and if the condition is fulfilled, he will become voluntary heir in such a way that he does not cease to be heir, but the nature of his right to the succession changes. 4. Deferment of opening the will does not change the legal position of a *necessarius heres*, as we are accustomed to say in the case of a substitute to an *impubes*; for it has been recorded that if a son of the deceased substituted to an *impubes* has given himself in *adrogatio*, he will be *necessarius heres*.

4 ULPIAN, *Sabinus, book 4:* A *suus heres* also can be instituted under a condition; but a son is a special case because he cannot be instituted under any sort of condition. But he can be [instituted] under such a condition as it is in his own power to fulfill; for on this there is agreement among all authorities. But does the institution only have effect if he has met the condition or even if he has not met it and has died? Julian thinks that a son instituted under this sort of condition, even if he has not met the condition, has been removed, and, therefore, if the son so instituted has a co-heir, he ought not to wait until the son meets the condition, although if he would make the father intestate by not meeting the condition, undoubtedly he ought to wait, and this view seems acceptable to me, so that [a son] instituted under such a condition as it is in his option [to fulfill] does not make his father intestate. 1. I think that it can properly be stated as a

general proposition that whether the condition was one which it was in his own power [to fulfill] or not is rather a question of fact; for even this condition, "if he has reached Alexandria," can be one which is not in his option because of wintry conditions and can also be one which is, if it has been imposed on someone who is operating a mile from Alexandria; even this condition, "if he has given ten to Titius," could give rise to difficulties if Titius is abroad on a long journey; and, because of this, resort should be had to the general proposition [that the question is one of fact in each case]. 2. But also if, where a son has been instituted heir under a condition which is in his own power, a grandson has been substituted to him or an *extraneus*, I think that the substitute will not become heir in the lifetime of the son, but will become heir after his death and a disherison of the son in respect of the substitute is not necessary, as, even if it were done, it is pointless; for it is done after the death of the son, which we show elsewhere to be ineffective; therefore, we are of the opinion that if a son has been instituted under a condition and that is in his own power he does not require disherison in respect of subsequent degrees [of heirs]; otherwise, he would require it in respect even of a co-heir.

5 JULIAN, *Digest, book 29:* MARCELLUS notes: If a condition under which a son has been instituted heir is such that at the last moment of his life it is certain that it cannot be fulfilled and, while the condition is outstanding, he dies, he will be heir to his father on intestacy, for example, "if he has reached Alexandria, let him be heir"; but if it can be fulfilled even at the last moment, for example, "if he has given Titius ten, let him be heir," I think the opposite.

6 ULPIAN, *Sabinus, book 4:* But if a time limit has been put on a condition, such as, say, "if he has climbed the Capitol within thirty days," the same can be held; that, if he has not met the condition, the substitute can be admitted, the son being repelled, is a consequence of the view of Julian and ourselves. 1. However, grandsons and all the others who, under the *lex Vellea*, if instituted do not break wills can be instituted under any sort of condition even if they come to have the position of a son. 2. We are accustomed to say that intervening periods are not prejudicial [to a person's position], such as when, say, a Roman citizen who has been appointed heir became a peregrine in the lifetime of the testator and then attained Roman citizenship; the periods in between do not prejudice him. A slave belonging to someone else, appointed heir under a condition, was delivered as a slave to a slave of the inheritance, then was usucapted by a stranger; the institution has not been vitiated. 3. If one owner has appointed a common slave as heir with a grant of freedom and has bought out his co-owner, the slave will become *heres necessarius*. But if he has been substituted to an *impubes* and the *impubes* has bought out the share, he will not become *heres necessarius*, as Julian writes. 4. But if he has been instituted [heir] with a grant of freedom, the question is raised in Julian's writings whether the grant of freedom can be taken away in a codicil. And he thinks that the ademption is not valid in the case where he would become *necessarius heres*, so that his freedom is not taken away from him by his own self; for a slave who is instituted heir receives his freedom from his own self. And this view is reasonable; for just as it cannot be bequeathed to himself [by himself], so it cannot be taken away from himself either.

7 JULIAN, *Digest, book 30:* If a common slave instituted heir under a condition has obtained his freedom in the lifetime of the testator, he can accept the inheritance even while the condition affecting the freedom given him by the will has not been fulfilled. 1. Again, if the testator alienated him or if the heir did so, after the death of the testator, he will accept the inheritance on the authority of his [new] owner.

8 JULIAN, *Urseius Ferox, book 2:* Two joint owners, having made a will, had declared a certain common slave to be heir and to have his freedom; both had died simultaneously, crushed in the fall of a building. Most authorities have given the decision that in this case the two have a freedman by will as heir and this is the better view. 1. But even if each joint owner had declared a common slave to be free and to be heir under the same condition and this condition had been fulfilled, the legal position will be the same.

9 ULPIAN, *Sabinus, book 5:* Whenever [a testator], intending to appoint one person as heir, has appointed someone else, making an error in the actual person, such as when intending to write, "my brother," he has written, "my patron," it is settled that neither is the person who was appointed heir, because the intention is lacking, nor the person intended to be appointed, because he has not been appointed. 1. And if someone has made an error in a thing, if, say, when intending to bequeath a dish he makes a legacy of a garment, neither will be due, whether he wrote [the provision] himself or dictated it to be written [by someone else]. 2. But if he did not make a mistake about the object, but about a share, say, when he had dictated that someone be appointed [heir] to a half he was appointed to a quarter Celsus, in the twelfth book of his *Questions*, and in the eleventh book of his *Digest*, says that the view is defensible that he will be heir for a half on the basis that more was declared and less written; and this view is supported by general rescripts. And it is the same even if the testator himself writes less, when he intended to make the appointment for the larger share. 3. But if the scribe who wrote the will or (what is more difficult to prove) the testator himself made the appointment for a larger share [than was intended], as by writing a half for a quarter, Proculus thinks that the heir will be heir for a quarter, because a quarter is included in a half, and Celsus also approves this view. 4. But even if someone had written two hundred for one hundred by a symbol, the legal position is the same; for there, too, both have been written, both what he [the testator] intended and what was added; and this view is not unreasonable. 5. Marcellus discusses also with the same result the case of someone with respect to whom he [the testator], intending to insert a condition, failed to add it; for he thinks that such a person is not instituted [heir] either; but if he added a condition when he did not intend to do so, [the person instituted] will be heir without the condition, nor will a declaration be regarded as made of what was written contrary to [the testator's] intentions; and this view he himself and we approve. 6. Marcellus also discusses whether, if the scribe who wrote the will left out or changed a condition contrary to the testator's intentions, [the person appointed] will not be heir, but must be regarded as not having been instituted. 7. But if when [the testator] had intended to appoint Primus heir he wrote Primus and Secundus, only Primus will be regarded as having been appointed, and he alone will be heir, as having been instituted in respect of a half. 8. If a person has not actually stated the name of the heir, but indicated him by an unmistakeable by-name which hardly differs from a name, but is not one of those which are usually added as an insult, the institution is valid. 9. No one can be instituted heir, except in such a way that he is definitely indicated. 10. If someone has said, "let whichever of my brothers Titius and Maevius has married Seia be heir for a twelfth and whichever has not married her be heir for a quarter," it is certain that there is here an institution correctly made; but it is uncertain which is instituted in what share. 11. Obviously, it will be similar if the institution has been made as follows, "let whichever of my above-written brothers has married Seia be heir," but I think that this institution also is valid, as made under a condition. 12. Heirs are successors to the legal position [of the deceased], and if several are instituted, the right [in the inheritance] should be divided among them by the testator; but if this is not done, all are heirs in equal shares. 13. If two people have been instituted heirs, one in respect of a third part of the Cornelian estate and the other in respect of two thirds of the same estate, Celsus follows the most convenient view, taken by Sabinus, that discarding mention of the estate, they take the inheritance as if they had been appointed heirs without specifying shares, provided that the intention of the head of the household is not very manifestly opposed. 14. If someone has made an appointment [as heir] as follows, "let Stichus be free, and after he shall be free let him be heir," Labeo, Neratius, and Aristo are of the opinion that leaving out the word in the middle, "after," both freedom and the inheritance are granted to him simultaneously; and this view seems correct to me also. 15. If a person has instituted Primus heir to a third and Secundus heir to a third and in case Secundus does not become heir appoints Tertius heir to two thirds, he, if Secundus repudiates the inheritance, will get two thirds not only by right of substitution but also by right of institution, that is, one third by substitution and one third by institution. 16. If a slave instituted heir with a grant of freedom has been alienated, he can be authorized to accept [the inheritance] by the person to whom he has been alienated; but if he has been bought back by the testator, the institution is valid, and he will be *necessarius heres*. 17. If a slave has been given his freedom from a specified date and the inheritance unconditionally and then he is alienated or

manumitted, let us consider whether the institution is valid. And, indeed, if he had not been alienated the view is defensible that the institution is valid, so that when the time for his freedom comes, which delays [his claim to] the inheritance, when he attains his freedom, he will also be *necessarius heres*. 18. But if freedom has been given from a specified time but the inheritance has been given under a condition, if the condition is fulfilled after the time specified has arrived, he will be free and heir. 19. But even if he has been instituted heir unconditionally, having been given his freedom from a specified date, if he has been alienated or manumitted, it ought to be held that he can be heir. 20. But even if the slave himself has not been alienated, but a usufruct has been constituted over him, the institution is equally valid, but is deferred to the time when the usufruct is extinguished.

10 PAUL, *Sabinus, book 1:* If a person has instituted heirs in shares in respect of one landed estate and another, the case is treated just as if the heirs had been appointed without the addition of shares; for because of the difference in the value of the shares, the shares of the inheritance cannot easily be found; therefore, the view expressed by Sabinus is more convenient, that the case is to be treated just as if he had specified neither an estate nor shares.

11 JAVOLENUS, *Letters, book 7:* "Let Attius be heir to me in respect of the Cornelian estate; let the two Titii be heirs in respect of that tenement block." The two Titii will get a half [of the estate] and Attius a half, and Proculus agrees with this decision; what do you think? He [Javolenus] replied that the opinion of Proculus is correct.

12 PAUL, *Sabinus, book 2:* If, when unequal shares [of the inheritance] have been given, the following is added, "let those whom I instituted heirs in unequal shares be heirs equally," the view to be taken is that they are made equal, that is, if this was written before the will was [formally] completed.

13 ULPIAN, *Sabinus, book 7:* Sometimes this addition "let them be heirs equally" explains the testator's wishes, as, say, when he writes, "let Primus and the sons of my brother be heirs equally"; for this addition makes clear that all have been instituted in equal shares, as Labeo also has observed; and if "equally" were taken away the sons of the brother would have half and Primus would have half. 1. A head of a household can distribute the inheritance in as many shares as he might wish; but the formal distribution of the inheritance is made into twelve shares. 2. Therefore, if he distributes less, by force of law it is adjusted to this [distribution], as where, say, he has appointed two heirs in respect of a quarter each; for the remaining part of the inheritance accedes to them, so that they are regarded as appointed in respect of halves. 3. But if one has been appointed heir in respect of a quarter and the other in respect of a half, the quarter which accedes accrues to them in proportion to their shares of the inheritance. 4. But if he has exceeded twelve shares in the division, there will likewise be a reduction proportionately; as where, say, he appointed me heir in respect of twelve shares and you in respect of six; I have two thirds of the inheritance; you have one third. 5. But if he appointed two people heirs *ex asse* [to the whole] and others to twelve shares, the question is raised in the fourth book of Labeo's *Posthumous Works* whether the distribution is made equally. And Labeo thinks that the former will be heirs to the extent of a half and the latter, who have been appointed in respect of twelve shares, will be heirs to the extent of a half, and I think that one should assent to this view. 6. But if he instituted two people heirs to the whole but a third to a half and a sixth, Labeo says in the same book that the whole inheritance should be divided into twenty shares of which the person appointed in respect of a half and a sixth will take eight and the other two twelve. 7. Also in Labeo the case is related [of an appointment of] "Titius in respect of a one third share" and then, after the whole twelve shares had been disposed of, "the same Titius in respect of a one sixth share"; Trebatius says that the inheritance should be divided into fourteen shares.

14 JAVOLENUS, *From Cassius, book 1:* If someone has instituted heirs as follows, "let Titius be heir in the first share, Seius in the second, Maevius in the third, Sulpicius in the fourth," equal shares in the inheritance will go to the institutes, because the testator is regarded as having rather imposed an order in the writing than a limitation on the shares by the reference to numbers.

15 ULPIAN, *Sabinus, book 7:* Julian also relates in the thirtieth book [of his *Digest*] that if a

person has appointed an heir as follows, "let Titius be heir to the extent of a half; Seius to the extent of a half; and, with regard to the share to which I instituted Seius in respect of the same share, let Sempronius be heir," it is open to doubt whether he intended to divide the inheritance into three half shares or rather to join Seius and Sempronius in one half share; and the latter is the better interpretation, and, therefore, they are regarded as having been instituted jointly; and so the result will be that Titius takes a half and the latter two take quarters. 1. Julian in the same book has written that if Primus [has been appointed heir] to the extent of a half and Secundus to the extent of a half and if Primus does not become heir, Tertius has been substituted in respect of three quarters, there is indeed a question what has been done; but it is rightly held that if, in fact, Primus has accepted [the inheritance], they will have equal shares; if he has repudiated [it], there will be fifteen shares of which Tertius will take nine and Secundus six.

16 JULIAN, *Digest, book 30:* For Tertius takes the role of both institute and substitute and is regarded as instituted in respect of three shares and substituted in respect of six.

17 ULPIAN, *Sabinus, book 7:* Again, let us discuss what Sabinus says, where someone has no share allocated to him. [The testator] appointed two people heirs in respect of one quarter each and a third without a [specified] share; he will take what has not been disposed of from the whole; and Labeo [says] this also. 1. And, hence, the same writer discusses the question whether, if [the testator] has appointed two people in respect of eleven shares and two without a [specified] share, and then one of those who had no share stated has repudiated [the inheritance], his half of a share belongs to all of them or only to the one appointed without a [specified] share; and he states different views. But Servius says that it accrues to all of them, and I think that this is the better view; for, so far as the right of accrual is concerned, those who are instituted without [specifying] a share are not [regarded as] joint institutes; and Celsus approves this in the sixteenth book of his *Digest.* 2. And the same writer thinks that even if, after disposing of the whole twelve shares, he has appointed two people heirs without [specifying] a share, neither the latter nor the former is jointly instituted. 3. But if, after disposing of the whole twelve shares, he has appointed another person heir without [specifying] a share, he will start on another whole. It is otherwise if, after disposing of the whole twelve shares, he had made the appointment as follows, "let him be heir in respect of the remaining share," because, as nothing has been left, he has not been instituted heir in respect of any share. 4. But if, after the whole twelve shares have been disposed of, two people are appointed [heirs] without [specified] shares, the question is raised whether those two are [instituted] to separate wholes or jointly instituted to one whole. And Labeo thinks, and it is the better opinion, that they share in one whole; for also where one person is instituted without [specification of] a share and two are instituted jointly without [specification of] a share, Celsus has written in the sixteenth book [of his *Digest*] that this does not produce three thirds but two halves. 5. But if someone distributes twenty-four shares and institutes a third person without [specifying] a share, this third person does not come into another twelve shares but into a one third share, as Labeo has written in the fourth [book of] his *Posthumous Works*, nor (inasmuch as it is acceptable) do Aristo or Aulus make any observation [on what he says].

18 PAUL, *Vitellius, book 1:* SABINUS: The question has been asked whether, if the head of a household had distributed more than twelve shares and had made someone heir without [specifying] a share, this person would have twelve shares or what would be left out of twenty-four. And I think that the latter is the most tolerable view, so that the same reasoning is applied in relation to twenty-four shares and everything succeeding as in twelve shares. PAUL: The same reasoning is relevant in the second twelve shares as in the first.

19 ULPIAN, *Sabinus, book 7:* Pomponius and Arrianus relate a case which occurred and is also discussed: If someone, leaving one share unfilled, made an institution as follows, "if Seius," whom he had not instituted, "shall not be heir to me, let Sempronius be heir," can the latter claim the vacant share of the inheritance? And Pegasus, in fact, considers that he can be admitted to that share; Aristo thinks the opposite, because he had been given a share which did not exist; and Javolenus approves this view, as do Pomponius and Arrianus, and this is the law we apply.

20 PAUL, *Sabinus, book 2:* At what place [among the institutions] an heir who is appointed without [specification of] a share is appointed, whether first or in the middle or last, does not matter. 1. If a quarter has been given to someone who is already dead and three quarters to someone else and someone else again is appointed [heir] without [specification of] a share, Labeo [holds] that the person who was instituted heir without [specification of] a

share will have another twelve shares and that this was the intention of the testator; and Julian also approves this and it is correct. 2. But he says that if a living and a dead person have been instituted heirs jointly in respect of a half and another person has been instituted in respect of the other half, they will have equal shares because the share of the dead man is regarded as if it had not been given.

21 POMPONIUS, *Sabinus, book 1:* Trebatius says that the following form of words is not correct: "Whoever shall be heir to me let Stichus be free and heir"; nevertheless he [Stichus] will be free. Labeo rightly thinks that he will also be heir. 1. I think that it is very true that a slave can be given his freedom unconditionally and the inheritance conditionally, to the effect, nevertheless, that both depend on the condition.

22 JULIAN, *Digest, book 30:* And, indeed, if the condition has been fulfilled, he will be free and heir, wherever [in the will] the freedom was given; however, if the condition fails, the case is treated as if freedom had been given without the inheritance.

23 POMPONIUS, *Sabinus, book 1:* If someone is instituted heir from a date certain or uncertain, he can claim *bonorum possessio* and sell off the inheritance as if he were heir. 1. But if he does not claim *bonorum possessio,* but defers fulfillment of a condition which he can easily meet, for example, "if he has manumitted a slave whom he has in his power," and he does not manumit, here it will be up to the praetor to follow the precedent of the clause in his edict in which he prescribes a time within which an inheritance is to be accepted. 2. Again, if the heir has not been able to meet a condition which he will not have it in his own power to fulfill, for example, where the institution has been made to depend on someone else's act or on some event, say, "if so-and-so has been made consul," then, on the application of the creditors, the praetor will determine that unless the inheritance has opened to the heir within a certain time and has been accepted, he will authorize the creditors to take possession of the property of the deceased and in the meantime authorize anything which has to be dealt with urgently to be sold off through procurators. 3. But if someone has been instituted heir under a condition and there are heavy debts [on the estate], which are growing because of penal clauses, and especially if there is public debt hanging over [it], the debts are to be paid off through a procurator, just as when an unborn child is in possession or a *pupillus* who is heir has no tutor. 4. And, therefore, he [Sabinus] says that provision was added for holding a *cognitio* on account of those who were abroad without an adjournment [having been arranged] or were so handicapped by sickness of mind or body that they cannot be brought into court, and yet were not being defended.

24 CELSUS, *Digest, book 16:* "Let Titius and Seius, whichever of them is alive, be heir to me." I consider that if each is alive both are heirs; if one has died, the one who has survived will be heir to the whole estate,

25 ULPIAN, *Rules, book 6:* because a tacit substitution is regarded as included in the institution;

26 CELSUS, *Digest, book 16:* and the senate resolved this also in the case of a legacy left in the same fashion.

27 POMPONIUS, *Sabinus, book 3:* If I have instituted you alone as heir, unconditionally in respect of one half share and conditionally in respect of the other, and have provided a substitute for you, Celsus says that if the condition is not fulfilled, the substitute will be heir in respect of that share. 1. But if I have instituted you as heir and then instituted you again under a condition, the later institution is completely invalid, because the earlier one was sufficiently complete. 2. But if several institutions have been made in respect of the same share under different conditions, whatever condition is first fulfilled will bring about the result we stated above, where the same person is instituted unconditionally and conditionally.

28 ULPIAN, *Sabinus, book 5:* If someone has been instituted as follows, "let Titius be heir if Secundus does not become heir," and then, "let Secundus be heir," it is agreed that Secundus has been instituted in the first degree.

29 POMPONIUS, *Sabinus, book 5:* By the expression "each one" all are meant; and, therefore, Labeo writes that if a will has been drawn as follows, "let Titius and Seius be heirs to me, each one of them in respect of the share in which he has appointed me

heir to him," unless all have appointed the testator heir, neither can be heir, because the writing refers to the act of all; and in this I think that the testator's intention must be respected. But it is more humane that, in fact, the one who appointed the testator as his heir should be heir to him in respect of as great a share, but the one who did not appoint him should not be admitted to his inheritance either.

30 ULPIAN, *Edict, book 21:* The Emperor Severus stated in a rescript that a slave subject to a pledge could be appointed *necessarius heres* to his master, but on condition that he first is prepared to satisfy the creditor.

31 GAIUS, *Provincial Edict, book 17:* We can institute slaves as heirs no less than we can children provided, namely, that they are the slaves of such persons as we can themselves institute as heirs, as *testamenti factio* with slaves has been introduced through the person of their masters. 1. It has become accepted that a slave belonging to an inheritance can be instituted heir before the inheritance is accepted for this reason, that it is accepted that the inheritance is the owner and takes the place of the deceased.

32 GAIUS, *Edict of Urban Praetor, book 1 on Wills:* This institution "whom Titius has wished" is defective for the reason that it has been left to the decision of someone else; for the old authorities have laid down constantly enough that the rights themselves created under wills should stand up by themselves and not depend on the decision of someone else. 1. A person who is in captivity is correctly instituted heir, because under the law of *postliminium* all rights vested in him as citizen are held in suspense, not broken off; therefore, if he has returned from captivity, he will be able to accept the inheritance. His slave is also correctly instituted heir, and if he has returned from captivity, he can authorize him to accept the inheritance; but if he died there, the person who is his heir can become heir through the slave.

33 GAIUS, *Edict of Urban Praetor, book 2 on Wills:* If someone has drawn his will as follows, "let Titius be heir in respect of a half share; let the same Titius be heir in respect of the other half if the ship has come from Asia," as the heir will accept under the unconditional institution, although the condition imposed on the other is still unfulfilled, he becomes heir to the whole inheritance, that is to say, even if the condition is not fulfilled, as the fulfillment of the condition is of no advantage to him; because indeed there is no doubt that if someone has been instituted heir in respect of a half share and no one else besides him, he is regarded as being instituted heir to the whole inheritance.

34 PAPINIAN, *Definitions, book 1:* An inheritance given from a specified time or to a specified time is not properly given, but removing the defect of [mention of a] time the institution stands.

35 ULPIAN, *Disputations book 4:* The following case, which actually happened, was put forward [for discussion]: A certain man had appointed two heirs, one in respect of his provincial assets and the other in respect of his Italian ones, and, as he was in the way of transporting merchandise to Italy, he had sent money to the provinces to buy merchandise, and this was bought either in his lifetime or after his death but had not yet been transported to Italy, the question was asked whether the merchandise belongs to the one who had been appointed heir in respect of the Italian assets or rather to the one [appointed] in respect of the provincial ones. I said that it had been accepted that an heir can be instituted in respect of specific assets, and the institution is not ineffective but it means that as it is part of the duty of the judge in an action for division of the inheritance to see to it that a person who has been instituted in respect of a specific thing should not get more than the thing in respect of which he has been appointed heir. Therefore, the matter will be dealt with in the following manner. Suppose, for example, that two people have been instituted heirs, one in respect of the Cornelian estate and the other in respect of the Livian estate, and one of the estates in fact forms three quarters of the inheritance and the other one quarter; they, indeed, will be heirs in equal shares as if they had been instituted without specification of shares, but they will be obliged in exercise of the judge's authority [to accept] that the estate which was left to each of them is adjudicated or attributed to each of them. 1. And, hence, I know the question arises in what shares the burden of the debts

should be borne. And Papinian, whose view I also have approved, relates that they ought to bear the debts in proportion to their shares of the inheritance, that is, one half each; for the estates are to be taken as if they were given as a *praelegatum.* And, therefore, if perhaps the debts are so large that nothing can remain after they have been taken away, we shall hold in consequence that those institutions made in respect of a specific thing are of no effect; and if perhaps the intervention of the *lex Falcidia* should make an abatement of the legacies necessary, in exercise of the judge's authority, this so abates their pre-emptive shares that each of them has no more than he would have had if he had received a legacy or something else or even *praelegata.* But if it should be uncertain whether the *lex Falcidia* will come into play, the approved view is, most rightly, that in exercise of the judge's authority *cautiones* will have to be given [that adjustment will be made]. 2. This being the case, even this institution, about which the question is raised, where one has been appointed heir in respect of the provincial assets and another in respect of the Italian ones, is not to be rejected, and in exercise of the judge's authority, there will be attributed to each the assets which were assigned to him, but they will be heirs in equal shares, because no share has been assigned [to either]. And the result is that if perhaps one lot of assets is greater (the Italian than the provincial, perhaps) and the other is less and the calculation of the debts is important, it ought to be held that the same reduction is to be made as we set out above; similarly also, if legacies have been left to others, a contribution will have to be made. 3. But consideration must be given to the question what assets are meant by the expression "Italian" or "provincial." And the whole thing turns on the wishes of the deceased; for it is necessary to look at what he meant. But this will have to be understood [thus], that by the expression "Italian assets" are covered those which he kept there on a permanent basis and so disposed that he would have them [there] permanently; otherwise, if it was for a time that he transferred them to another place, not so that he would keep them there, but with a view to bringing them back again to the former place, then he will neither increase [the assets] in the place to which he transferred them nor reduce them in the place from which he transferred them, as where, say, he had sent certain slaves from his Italian property to a province, such as Gaul, to collect a debt or buy merchandise, intending that they should return if they had made the purchase; there is no doubt that it must be held that they ought to pertain to the Italian property. As is related in Mucius where an estate had been left by legacy, either with its *instrumentum* or with what was on it; for Mucius says that a groom sent to the country house by the head of the household will not form part of the legacy of the estate because he had not been sent there to stay there. Just as the opinion has been given that if a slave has been sent to a country house to stay there for the time being because he had offended his master, being as it were exiled for a period, he is not included in a legacy of the country house. And, therefore, not even those slaves who were accustomed to work on the land, who were going to return to other lands, being also, as it were, borrowed from other land, are in such a position that they are included in the legacy, because they had not been on the land in such a way that they were regarded as appropriated to that land. And this also suggests in the instant case that those assets which the testator intended to be in Italy are to be accepted as included in the Italian assets. 4. And, hence, where he sent money to the provinces to buy merchandise and this has not yet been bought, I hold that here also the money which was sent for the very purpose that by means of it merchandise should be transported to Italy is to be added to the Italian property; for even if he had paid in the provinces from the monies which he managed in Italy freights going and returning, it must be held that this also relates to the Italian property. 5. Therefore, reason leads to holding the view that that merchandise also which has been bought in order to be transported to Rome, whether sent off in his lifetime or not yet sent off, and whether he knows or did not know, belonged to that heir to whom the Italian assets were assigned.

36 ULPIAN, *Disputations, book 8:* If someone has appointed an heir as follows, "let him be heir in the same share as that to which I shall appoint Titius heir in a codicil," even

if no share has been appointed in a codicil, he will still be heir as if instituted without [specification of] a share.

37 JULIAN, *Digest, book 29:* When the following is written in a will, "if my son dies in my lifetime, let my grandson through him, born after my death, be heir," there are two degrees of heirs; for in no case are both admitted to the inheritance. And from this it appears that if Titius has been substituted to the grandson and the son has become heir to his father, Titius cannot be heir along with the son, because he is substituted, not in the first, but in the second, degree. 1. These words, "let Publius, Marcus, and Gaius, substituted in turn to one another, be heirs to me," are to be interpreted in the sense that the testator is regarded as having, in abbreviated form, instituted three heirs and in turn substituted them to one another, just as if he had written the following, "let 'X' and 'Y' and 'Z' be instituted heirs and be substitute heirs." 2. A man who had three sons and wrote as follows, "let my sons be heirs; let my son Publius be disinherited," can be regarded as having instituted only two sons as heirs in the first part.

38 JULIAN, *Digest, book 30:* A man who leaves a legacy of [a slave] Pamphilus to his *impubes* son, whom he has disinherited, can institute Pamphilus heir for a share after the death of his son in the same way as a man who leaves a legacy of a slave to Sempronius and then institutes him as heir for a share after the death of Sempronius. 1. A slave appointed heir by will unconditionally but ordered to be free if he had given ten before the first of December, if he has received his freedom unconditionally by codicil, will neither be free nor heir all the same before the first [of December], unless he has given ten; if he has not given [it] before the first, he will be free by virtue of the codicil. 2. If a person had declared his slave free under a condition and appointed him heir unconditionally and had sold him while the condition was still unfulfilled, the slave can accept the inheritance on the instructions of the purchaser because the institution stands and there is also someone who has the right to command him. 3. But if he had been alienated after the condition had failed, he cannot accept the inheritance on the buyer's instructions, because he had come to him at a time when the institution, having already been extinguished, was ineffective. 4. Therefore, when a slave is ordered to be free under a condition and has received a legacy unconditionally, if he had been manumitted or alienated while the condition was still unfulfilled, he will have the legacy or will acquire [it] for his master, although at the time of the death the condition on which he was to have his freedom should have been extinguished; but if he has been manumitted or alienated after the condition has failed, the legacy will lapse into nullity. 5. When a seller orders a slave, appointed heir in part by the buyer before delivery, to accept [the inheritance], he is under the necessity of making restitution to the slave's co-heir, because he ought not to make a profit in right of the slave whom he sold. Obviously, he will not restore everything which he has acquired but only that proportion which corresponds to the share in which the slave had a co-heir,

39 MARCIAN, *Rules, book 2:* that is, a half share of the slave and a quarter of the inheritance.

40 JULIAN, *Digest, book 30:* MARCELLUS notes: But he ought also to pay over what the seller could not have acquired if, before the slave accepted the share of the inheritance, he had been delivered; which is true.

41 (40) JULIAN, *Digest, book 30:* If a head of a household has appointed as heir Titius, whom he believed to be freeborn, and substituted Sempronius to him if he should not be heir and then Titius, because he was in fact a slave, has accepted the inheritance on the instructions of his master, it can be held that Sempronius is admitted to a share of the inheritance. For if someone who knows that someone is a slave and appoints him heir and makes a substitution [to him] as follows, "if Stichus shall not be heir, let Sempronius be heir," he is understood as saying as much as, "if Stichus shall neither himself be heir nor shall have made someone else [heir]." But if someone has appointed as heir a person whom he thinks to be free, this expression, "if he shall not be heir," is understood as having no other meaning than that if he has not acquired the inheritance

for himself or, having changed his status, has not made someone else heir; and this addition relates to those who, having been appointed heirs when heads of a household, afterward have been reduced into slavery. Therefore, in this case half shares will be created in such a way that one half is divided in equal shares between the person who was owner of the instituted heir and the substitute.

42 (41) POMPONIUS, *Readings, book 12:* And Tiberius Caesar laid this down in the case of Parthenius who, having been appointed heir as being freeborn, had accepted the inheritance, when he was an imperial slave; for the inheritance was divided between Tiberius and the person who had been substituted to Parthenius, as Sextus Pomponius relates.

43 (42) JULIAN, *Digest, book 64:* A person who was not solvent had ordered two [slaves called] Apollonius to be free and heirs. One having died before the opening of the will, it will be possible, not inelegantly, to defend the view that the one who survived will be free and the sole *necessarius heres*. But if both are alive, the institution is [I think] of no effect on account of the *lex Aelia Sentia*, which forbids the creation of more than one *necessarius heres*.

44 (43) PAUL, *Lex Aelia Sentia, book 1:* For they stand in each other's way.

45 (44) ALFENUS, *Digest, book 5:* A head of a household had instituted two heirs by will; he had ordered them to build a monument within a specified number of days; then he had written: "Whichever of them has not done so, let all be disinherited"; one heir had not taken up the inheritance and the remaining heir, when he himself had built the monument, sought an opinion whether he would be denied the position of heir in view of the circumstance that his co-heir had not accepted the inheritance. He replied that no one can be bound to an inheritance or disinherited by the act of another person, but insofar as each had fulfilled the condition, although no one else had accepted [the inheritance], he was nevertheless heir.

46 (45) ALFENUS, *Digest, Epitomized by Paul, book 2:* "If Maevia, my mother, and Fulvia, my daughter, are alive, then let Lucius Titius be my heir." Servius gave his opinion that if the testator never had a daughter, but his mother had survived, Titius nevertheless would be heir, because anything impossible which had been written in a will, had no force.

47 (46) AFRICANUS, *Questions, book 2:* A certain man, when he proposed to institute a son-in-power as his heir in such a way that nothing of the inheritance should come into the hands of the head of the household, made his intentions known to the son; as the son feared that his father would be offended, he asked the testator that he should not institute him as heir on the condition "if he had been emancipated by his father" and persuaded him to institute as heir his [the son's] friend; and so in the will a friend of the son who was unknown to the testator was instituted heir, and nothing was asked of him [with regard to disposal of the inheritance]. The question was asked whether, if the friend concerned either refused to accept the inheritance or refused to hand it over after acceptance, he could be sued on a *fideicommissum* or whether there was any action against him and [if so] whether it would lie to the father or to the son. He [Julian] replied that although it is clear that the appointed heir had accepted a trust, nevertheless, he could not be sued on a *fideicommissum* unless it was proved that the testator himself had also relied upon his trust. Nevertheless, if, when he was asked by the son-in-power, the friend had undertaken both that he would accept the inheritance and that he would hand it over to the son when he became head of a household, it could be held, without absurdity, that there would be an action on mandate; and that that action would not be available to the father because it is not in accordance with good faith that there should be handed over to him what the testator did not wish to come to him; but the normal action would not be competent to the son either, but an *actio utilis*, just as it was settled that [an *actio utilis*] should be given to a person who had given a verbal guarantee for someone when he was a son-in-power and had paid after he became head of a household.

48 (47) AFRICANUS, *Questions, book 4:* If [a will] was written as follows, "let Titius, no, rather, Seius be heir," he [Julian] gave it as his opinion that Seius alone would be heir. But even if [it read] as follows, "let Titius be heir; no rather let Seius be heir," the same will have to be held. 1. A certain man instituted heirs in his will as follows: "Let Titia, my daughter, be heir; if any children shall be born to me in my lifetime or after my death, then if one or more of the male sex shall be born, let him be my heir to the extent of three quarters; if one or more of the female sex is born, let her be my heir to the extent of one quarter"; a *postumus* was born to him; he [Julian] was consulted on the size of the share to which the *postumus* was heir. He replied that this inheritance should be distributed into seven shares and of these the daughter would have four and the *postumus* three, because the daughter was given a whole unit [of distribution] and the *postumus* three quarters of a unit, so that the daughter should take a quarter share more than the *postumus*. Therefore, if a *postuma* also had been born, the daughter alone would have had as much as each of the *postumi*. Therefore, in the instant case, as a whole unit was given to the daughter and three quarters of a unit to the *postumus* twenty-one shares are to be created, so that the daughter may have twelve and the son nine. 2. A will was drawn up as follows: "Let Lucius Titius be heir to me to the extent of two twelfths, Gaius Attius to the extent of one share, Maevius to the extent of one share, and Seius to the extent of two shares"; he [Julian] was consulted on what the legal position was. He replied that this document could bear the interpretation that Lucius Titius should have two twelfths but the others are heirs to the extent of the remaining ten twelfths as if instituted without reference to shares; and these ten twelfths ought to be divided in such a way that Seius has five twelfths and Attius and Maevius the other five twelfths.

49 (48) MARCIAN, *Institutes, book 4:* An institution in these words "let Titius be owner of my inheritance" is properly made. 1. The following institution is valid: "Let my most undutiful son, ill-deserving of anything from me, be heir"; for he is unconditionally instituted heir, with abuse, and all institutions of this sort are accepted. 2. Sometimes a slave instituted heir by his mistress is not effectively instituted even if he is also given his freedom, as is indicated in a *constitutio* of the deified Severus and Antoninus, which runs as follows: "It is only reasonable that before the verdict has been given, a slave accused of adultery should not be regarded as lawfully manumitted by will by the woman who has been prosecuted for the same crime." And, hence, it follows that an institution made in his favor by his mistress has no effect. 3. If an error has been made in stating a person's father or his homeland or other similar description, the institution is valid, provided that it is certain who was referred to.

50 (49) FLORENTINUS, *Institutes, book 10:* If I have ordered the slave of someone else to be free and heir and he afterward becomes mine, neither [grant] is valid because freedom given to the slave of someone else is not effectively given. 1. In the case of *extranei heredes*, the following points are to be observed: that there is *testamenti factio* with them, whether it is they themselves who are instituted heirs or those who are in their power; and that is investigated at two points of time, when the will is made, so that the institution may come into existence; and when the testator dies, so that it may have effect. Furthermore, when he accepts the inheritance, there ought to be *testamenti factio* with him, whether he has been instituted heir unconditionally or under a condition; for the legal position of the heir is to be investigated above all at the time when he acquires the inheritance. However, in the intervening period between the making of the will and the death of the testator or the fulfillment of a condition of the institution, a change in his legal position does not prejudice the heir, because, as I have said, we look at three points of time [only].

51 (50) ULPIAN, *Rules, book 6:* If in my lifetime I sold my slave, whom I instituted heir with a grant of freedom, to a person with whom there is no *testamenti factio* and afterward I bought him back, he will be able to be my heir under the will, and the intervening period, during which he was with that person, did not vitiate the institution, because it is the case that at both times, both the time of making the will and that of death, he was mine. And so, if he has remained with that person, the institution is vitiated; or if there is *testamenti factio* with him, by accepting the inheritance on his instructions, he will acquire the inheritance for him. 1. If an impossible condition, consisting in not doing something, has been

attached to the institution of an heir, according to the view of every authority, he will be heir, just as if he had been instituted unconditionally. 2. An inheritance is generally divided into twelve shares which are included in the whole called the *as*. However, these shares also have their own names, from one twelfth up to a whole, as, let us say, a sixth, a quarter, a third, five twelfths, a half, seven twelfths, two thirds, three quarters, five sixths, eleven twelfths, a whole.

52 (51) MARCIAN, *Rules, book 3:* Some authorities used to think that an institution such as the following was not valid: "Let Stichus be free, and if he is free, let him be heir." But the deified Marcus declared in a rescript that this institution was valid, just as much as if, "if he is free," had not been added. 1. If a person has drawn his will as follows, "let Stichus, if he is mine when I die, be free and heir," if [Stichus] has been alienated, he will not be able to accept the inheritance on the instructions of the buyer, although, even if this had not been expressly stated, he could not have been made free and heir otherwise than if he had remained his [the testator's] property. But if he manumitted him in his lifetime Celsus states in the fifteenth book of his *Digest* that he will become heir; for it is plain that the testator did not intend to exclude this eventuality and the wording is not wholly inconsistent [with such an interpretation]; for although he is not his slave, yet he is certainly his freedman.

53 (52) PAUL, *Rules, book 2:* A slave forming part of an inheritance can be instituted as an heir, provided that there was *testamenti factio* with the deceased, although there is not *testamenti factio* with the instituted heir.

54 (53) MARCELLUS, *Replies, sole book:* Lucius Titius, having instituted Seius and Sempronius as heirs in respect of halves and disinherited the others, substituted Seius and Sempronius as heirs to one another, then made gifts of legacies and of freedom, and afterward added the following: "Let Cornelius and Sallust and Varro be heirs in equal shares, and I substitute them to one another." I ask how much the former two, instituted in respect of halves, or the latter should have. Marcellus replied that it was unclear whether he [the testator] intended to institute Cornelius and Sallust and Varro as heirs in the first, the second, or the third degree; but, as the will which was produced was framed, a second whole unit appeared to have been given to them.

55 (54) NERATIUS, *Parchments, book 1:* A father substituted a slave as heir to his *impubes* son and ordered him to be free; the *pupillus* sold him [the slave] to Titius; Titius, who had already made a first will, ordered him to be free and heir in a second will. Titius's former will has been broken, because that slave can also be heir, and in order that an earlier will be broken, it is sufficient that a later one is so made that in some eventuality an heir could have existed under it. However, so far as the force of the institution in question is concerned, the position is such that so long as [the slave] can be heir to the *pupillus* in terms of that substitution, he cannot obtain his freedom and the inheritance under the will of Titius; if the *pupillus* has reached full age, he [the slave] will be free and heir under Titius's will just as if he had not been substituted to the *pupillus*; if he has become heir to the *pupillus*, the better view is that he can be heir to Titius also if he wishes.

56 (55) PAUL, *Lex Aelia Sentia, book 1:* If a person who is insolvent has [given] freedom to and instituted as heir, in the first place Stichus, and in the second place a slave to whom he is bound to give his freedom because of a *fideicommissum*, Neratius says that the slave appointed in the second place will be heir because he is not regarded as having been manumitted with a view to defrauding creditors.

57 (56) PAUL, *Secundae Tabulae, sole book:* A person can institute an heir as follows: "If I die before my seventieth year, let so-and-so be my heir"; for he ought not to be regarded as being partly testate, but as having made an institution under a condition.

58 (57) PAUL, *Edict, book 57:* If a person who is insolvent has instituted a slave as heir with a grant of freedom and has substituted a freeman, a beginning will have to be made with the substitute before [the slave]; for the *lex Aelia Sentia* preserves the

freedom of [a slave] who has been instituted heir in fraud of creditors only if no one else can be heir under that will.

59 (58) PAUL, *Vitellius, book 4:* No one doubts that an heir can properly be [orally] declared as follows: "Let this man be heir to me," when the person who is pointed out is present. 1. A person who is not a brother, if he is loved with brotherly affection, is properly instituted heir by his name with the description "brother."

60 (59) CELSUS, *Digest, book 16:* A freeman, when he was held by you in the belief that he was a slave, having been instituted heir on your instructions, accepted [the inheritance]. Trebatius [says] that he is heir, Labeo that he is not heir if he did so by necessity and not because he wished in any case to be bound. 1. If a person instituted an heir as follows, "let Titius be heir to me in same share as that in which he is partner with me in collecting the tax on salt-works," some authorities think that if this has been added after twelve shares in the inheritance have been set out, however much Titius was a partner, he is not heir, but if any share [of the inheritance] has been left unfilled, he is heir in respect of that. This is wholly inept and unsound; for what is there to prevent Titius from being effectually instituted heir for, say, the quarter share which he had as partner after twelve shares in the inheritance have been set out? 2. "Let Titius be heir; let Seius and Maevius be heirs." The view which Proculus favors is correct, that there are two half shares, one of which is given jointly to the two. 3. When one of the institutes, who has not been instituted jointly with anyone else, does not become heir, his share accrues to everyone in proportion to their shares in the inheritance, and it does not matter whether someone has been instituted heir in the first place or substituted to someone else. 4. If the instituted heir was a Roman citizen at the time of writing the will, then was interdicted from fire and water, he becomes heir, if he has returned before the time of the testator's death or, if he was instituted heir under a condition, at the time when the condition is fulfilled. The same [applies] also in legacies and in *bonorum possessiones*. 5. "Let Titius be heir in respect of a half; let Seius be heir in respect of a quarter; if Titius has climbed the Capitol, let him be heir in respect of the other quarter." If he acts as heir before he climbs the Capitol, he will be heir in respect of a half; if he has climbed the Capitol, he will also be heir in respect of a quarter, and it will not be necessary for him to act as heir [again], being obviously heir already. 6. If a will has been framed as follows, "let Titius be heir in respect of a one third share; let Maevius be heir in respect of a one third share; if a ship has come from Asia by three days before the first of the month, let Titius be heir in respect of the remaining share," let us see whether Titius is not immediately heir in respect of a half; for two heirs have been instituted, but Titius in respect either of a half or of two thirds; thus, one sixth at least will be in suspense, and if the condition is fulfilled, he will be heir in respect of two thirds, and if it is not, that sixth will accrue to Maevius. But if Titius has died before the condition is fulfilled and then the condition is fulfilled, that sixth will still accrue, not to the heir of Titius, but to Maevius; for when it was still doubtful whether that sixth had been given to Titius or to Maevius, Titius died, and it cannot be regarded as given to someone who at the time of the grant was not in existence. 7. If Attius has appointed Titius and Maevius and Seius heirs in equal shares, Titius, in the meantime, has alone accepted the inheritance and has instituted Seius as his heir, Seius will be able to accept the inheritance of Titius and either accept or not take up that of Attius; but he will be heir in respect of a half to Attius before he accepts or rejects his inheritance. If Seius has accepted the inheritance of Attius, Titius will be heir only to the extent of one third, and only one third will come to Seius through the inheritance of Titius, and he will have the other third through his own institution. What, then, if Titius and Seius have been instituted heirs by Attius, Titius has accepted the inheritance, and Seius has become heir to Titius? Can he reject the inheritance of Attius, or is he necessarily heir to him in respect of the whole? And, indeed, as no one has been instituted heir other than the person who is himself already heir in respect of some share, it is just as if one heir was instituted through Titius.

61 (60) CELSUS, *Digest, book 29:* A person who was insolvent appointed one slave as

heir in the first place and the other as heir in the second place. Only the one who was appointed in the first place takes the inheritance; for by the *lex Aelia Sentia* it is provided as follows: If two or more have been appointed heirs for the same reason, whichever has been appointed first is heir.

62 (61) MODESTINUS, *Replies, book 8:* A man who wished to disinherit his daughter wrote as follows in his will: "But I have disinherited you, my daughter, because I intended you to be satisfied with your dowry"; I ask whether she has been efficaciously disinherited. Modestinus replied that nothing in the facts set forth suggested that she had not been disinherited in accordance with the testator's intentions.

63 (62) MODESTINUS, *Encyclopaedia, book 2:* It is a matter of favor that an heir can be instituted as from the time of taking up the inheritance, as, for instance, "let Lucius Titius be heir when he is in a position to take the inheritance"; the same applies to a legacy also. 1. Whenever it is not clear who has been instituted heir, the institution is not valid (as, in fact, can happen if a testator has several friends with the same name and uses a single name as the designation), unless, through other very clear evidences, it has been revealed which person the testator intended to favor.

64 (63) JAVOLENUS, *From Cassius, book 1:* Whether heirs appointed without reference to shares have been appointed jointly or severally matters in this respect, that if any of those appointed jointly has died, his share goes not to all [the heirs], but to the others who had been appointed jointly [with him], but if any of those appointed severally [has died], his share goes to all who were appointed heirs in the same will.

65 (64) JAVOLENUS, *Letters, book 7:* Labeo often writes that the slave of someone who is born after my death can be instituted heir [to me], and he proves the truth of this by a clear argument, because a slave belonging to an inheritance can be instituted heir before the inheritance is accepted, although he belongs to no one at the time the will is made.

66 (65) JAVOLENUS, *Letters, book 12:* The inheritance does not belong to Statius Primus under any legal provision, since he was not instituted heir; and it does not help him at all that something was left by legacy charged on him or that a freedman was commended to his care in the deceased's will. And it follows from this that if he has not been manumitted, he is [still] a slave.

67 (66) POMPONIUS, *Quintus Mucius, book 1:* If a person has instituted heirs as follows, "let Titius be heir; let Gaius and Maevius be heirs in equal shares," although the syllable "and" creates a joint institution, nevertheless, if one of the last-named dies, his share does not accrue to the other alone, but to all the co-heirs in proportion to their shares in the inheritance because he [the testator] appears not so much to have made a joint institution as to have expressed himself in that way for greater speed.

68 (67) POMPONIUS, *Quintus Mucius, book 2:* If a will has been framed as follows, "let Tithasus be heir if he has climbed the Capitol; let Tithasus be heir," the second statement will be preferred; for it makes a fuller grant than the first.

69 (68) POMPONIUS, *Quintus Mucius, book 7:* If a person has instituted Sempronius as heir on the following condition, "if Titius has climbed the Capitol," although Sempronius cannot be heir unless Titius had climbed the Capitol and his becoming heir itself has been left in the power of Titius [to decide], because the wishes of Titius have not been referred to expressly in the document that institution will nevertheless be valid. But if someone has made an appointment as follows, "if Titius should wish, let Sempronius be heir," the institution is not valid; for certain matters, if expressed in wills, have no effect when, if they are concealed in the words, they have the same meaning as express statements would have and will have some force. For, to take an example, the disherison of a son is valid when it comes about that someone emerges as heir; and yet no one doubts that if someone has disinherited his son as follows, "let Titius be heir; when Titius is heir, let my son be disinherited," the disherison is of no effect.

70 (69) PROCULUS, *Letters, book 2:* "Let Cornelius and Maevius, whichever of them wishes, be heir"; both wish to be [heir]; Trebatius [says] that neither will be heir, Cartilius that both; with whom do you agree? Proculus: I agree with Cartilius and think that the addition "whichever of them wishes" is superfluous; for even if that were not added, the position would be that whichever of them wished would be heir and whichever of them did not wish would not be heir. But if the persons in question were among the *necessarii heredes*, then that addition would not be useless, and it would contain not merely the appearance but also the force of a condition; nevertheless, I would hold that if both wished to be heir, both would be heir.

71 (70) PAPINIAN, *Replies, book 6:* The senate condemned as mercenary not those institutions which have brought about dispositions based on mutual affection, but those containing a condition aimed at violating the privacy of another person's wishes.

72 (71) PAUL, *Lex Julia et Papia, book 5:* But institutions such as the following are not mercenary, if, for example, a person makes an institution as heir in the following terms: "For whatever share Titius has instituted me heir, let Maevius be heir for the same," because the institution is directed toward the past and not the future. 1. But the question can be asked whether the resolution of the senate is also to be applied, even if the testator has directed his catch at another person, for example, if he has made an appointment as follows: "Let Titius be heir if he has shown and proved that Maevius has been appointed heir by him in his will." And there is no doubt that this falls within the intended scope of the *senatus consultum.*

73 (72) TERENTIUS CLEMENS, *Lex Julia et Papia, book 4:* If a person cannot by [this] statute take the whole of what has been left to him and he has been instituted to a whole inheritance by someone who is insolvent, Julian has given it as his opinion that he is heir to the whole inheritance; for the statute does not apply in respect of an inheritance which is not solvent.

74 (73) GAIUS, *Lex Julia et Papia, book 12:* If we make a substitution to an heir instituted under a condition, unless we repeat the same condition, we are understood to substitute him as heir unconditionally.

75 (74) LICINNIUS RUFINUS, *Rules, book 2:* If a person has been instituted heir as follows, "let him be heir with the exception of such-and-such a farm, under exception of a usufruct in such-and-such," at civil law it will be as if he had been instituted heir without that qualification and this was settled by the authority of Gallus Aquilius.

76 (75) PAPINIAN, *Questions, book 12:* If a son is substituted to a person in respect of whom he has been passed over, he will have the inheritance, not as on his father's intestacy, but under the will, because even if anyone else had been substituted, and he had been disinherited in respect of him, the will would begin from the point where the son had been disinherited.

77 (76) PAPINIAN, *Questions, book 15:* A slave gifted to a wife by a husband *mortis causa* remains the property of the husband, as Julian also holds. The same slave will be *necessarius heres* to the husband if he receives his freedom and the inheritance at the same time; nor can anything be left to him by legacy unless he is given his freedom.

78 (77) PAPINIAN, *Questions, book 17:* When the whole inheritance had not been distributed, the following provision appeared in the will: "Let the person whom I make heir in a codicil be heir"; he [the testator] instituted Titius heir in a codicil. His institution is in fact valid, because, although an inheritance cannot be granted by a codicil, the inheritance here is regarded as granted by the will; but he [Titius] will have only this, as much of the whole inheritance as remained undistributed.

79 (78) PAPINIAN, *Replies, book 6:* A man who was not in military service instituted a freedman as heir to the maternal property which he possessed in Pannonia, and instituted Titius as heir to the paternal property which he had in Syria. It has been established that by law both [heirs] have a half share [of the inheritance] but that the arbitrator in the action for division of the inheritance gives effect to the last will [of the deceased], making adjudications [as necessary] and requiring *cautiones* on account of actions without prejudice to the *lex Falcidia*, that is to say, so that what they would respectively pay over to one another is set off by retention of a quarter, using the defense of fraud. 1. Where Lucius Titius had

been appointed heir in respect of two shares and Publius Maevius in respect of a quarter of the inheritance, I gave it as my opinion that the whole inheritance had been divided into three quarters; for the size of the two shares was indicated by the quarter [mentioned]; for where coins had been left by legacy to Titius without specification of the species of coins, in looking at the other legacies the old authorities took the same view. 2. Where sons had been instituted heirs in equal shares and afterward a son of a brother was instituted to two twelfth shares, it was settled that this institution was to be regarded as making up one whole, divided among all of them, and of it the sons had received ten twelfth shares; for a share of a second whole is understood to have been left only when no remaining share is [to be] found because one whole has been given specifically or twelve twelfth shares have been distributed; but it does not matter at what point [in the list of institutions] someone is instituted heir without reference to a share, in order that he is to be regarded as having been given, rather the remainder of the whole [than a separate whole]. 3. Seius has instituted Maevius heir for the share which he can take under the statutes and Titius for the rest. If Maevius is able to take the whole inheritance, Titius will not be an added or substitute heir.

80 (79) PAPINIAN, *Definitions, book 1:* But if there is no mention made of the rest, Titius will have as much in a second whole as Maevius in the first.

81 (80) PAPINIAN, *Replies, book 6:* But if Maevius is capable [of taking] nothing, the substitute will be admitted to the whole.

82 (81) PAUL, *Questions, book 9:* Clemens Patronus had provided in his will that if a son had been born to him, he should be heir and, if two sons, they should heirs in equal shares; if two daughters, similarly; if a son and a daughter, he had given the son two shares and the daughter a third share. Two sons and a daughter having been born, the question was asked how we should make up the shares in the case proposed, as the sons ought to be equal, even also each receive twice as much as their sister. Therefore, five shares ought to be created so that the males may have two of them each and the female one. 1. If a testator has framed his will as follows, "let Sempronius be heir to me for a share as large as that for which I had read out that I had been instituted heir by Titius," this is not a mercenary institution; obviously, if no will was read out by the testator himself, the institution will be regarded as void with no question of suspicion that the institution was mercenary.

83 (82) SCAEVOLA, *Questions, book 15:* If someone is instituted heir as follows, "if the *legitimus heres* does not wish to bring a *vindicatio* for my inheritance," I think that the condition in the will fails if the *legitimus heres* brings the *vindicatio*.

84 (83) SCAEVOLA, *Questions, book 18:* If it is not the *lex Aelia Sentia*, but another statute or a *senatus consultum* or even a *constitutio* which stands in the way of a slave's freedom, he cannot become *necessarius heres*, even if the testator is not solvent. 1. In the times of the deified Hadrian, the senate resolved that where a testator, who when dying was insolvent, gave freedom to two or more [slaves] and ordered the inheritance to be handed over to them and the instituted heir declared that he doubted the solvency of the inheritance, he should be compelled to accept it, and [the slave] who had been named first should have his freedom, and the inheritance should be handed over to him. And the same procedure should be observed in those cases where freedom was given by *fideicommissum*. Therefore, if the slave first named should wish to accept the inheritance, there will be no difficulty. For if the later ones also should claim that they are free and ask that the inheritance be handed over to them, there would be an investigation before the praetor whether the inheritance is solvent and ought to be handed over to all those made free. However, if the first[-named] is absent, a later one wishing the inheritance to be accepted should not be heard because if the first[-named] wishes the inheritance to be handed over to him, he is to be preferred and the latter will be a slave.

85 (84) PAUL, *Questions, book 23:* Where freedom was given to a slave by *fideicommissum* and the heir had left this same slave as his heir with a grant of freedom, it was asked whether he becomes *necessarius heres*. And it is more humane and more strongly supported by the argument of equity [to hold] that he does not become *necessarius*; for one who could force freedom to be given, even against the wishes of the deceased, if ordered to be free, does not appear to obtain a great benefit from the deceased; indeed, he does not appear to have enjoyed any advantage, but rather to have received the freedom owed to him. 1. The same view will have to be approved also in the case of a slave which the testa-

tor bought with a provision [in the contract] that he would manumit him if he were instituted heir; for here also, regardless of any benefit given by the testator, he will be able to attain freedom in his own right under a *constitutio* of the deified Marcus. 2. The same applies also in the case of one who has been bought from someone using his own money; for he also would be able to force the testator himself to give him freedom.

86 (85) SCAEVOLA, *Replies, book 2:* Lucius Titius, who had a brother, provided in his will as follows: "Let Titius my brother be my heir in respect of the whole inheritance; if Titius should not wish to be my heir or (abominable thought) dies before he has accepted my inheritance or does not have a son or daughter born to him, then let my slaves Stichus and Pamphilus be free and heirs to me in equal shares." Titius accepted the inheritance and had no children at the time of accepting it. I ask whether Stichus and Pamphilus can be free and heirs in terms of the substitution? I ask also, if they cannot be free or heirs in terms of the substitution, whether they are to be regarded as additional heirs in a share of the inheritance. He [Scaevola] replied: It is indeed apparent that it was not the testator's intention that anyone should be brought in as heir with his brother, whom he had clearly instituted heir in respect of the whole inheritance; therefore, if the brother accepted [the inheritance] Stichus and Pamphilus—whom, moreover, he did not want to be heirs if his brother died before he accepted the inheritance leaving children—will not be heirs. For the prudent arrangement of the testator is taken into account; for he preferred to the substitutes not only his brother but also his [the brother's] children.

87 (86) MAECIANUS, *Fideicommissa, book 7:* It can no longer be doubted that *sui heredes* can be instituted on this condition that if they had so chosen, they should be heirs [and] if they were not heirs, some one else whom the testator has chosen to substitute to them [can be appointed]; and that it is denied that in this case it is necessary to disinherit a son on the contrary condition, first, because that would only be required when it was not in his own power [to decide] whether he should be heir to his father, awaiting [as he would be] the result of a condition imposed which depended on some external factor, and next, because, even if a son ought to be disinherited on the contrary condition, whatever the condition imposed, in the instant case, such a condition could not even possibly be found, and, certainly, if formulated expressly, it would be inept; for in the case of this condition, "if he wishes, let him be heir," what other contrary words can be formulated than these, "if he does not wish to be heir, let him be disinherited?" And how ridiculous this is no one can fail to see. 1. However, it is not irrelevant at this point, as being beyond the subject, that there should be added here that if *sui heredes* have been instituted in the style, "if they wished to be heirs," they should not be allowed further to abstain from [taking up] the inheritance, as those instituted on that condition have already become heirs, not as *necessarii*, but of their own volition. But also if *sui* meet the other conditions which it is in their own power to meet they ought not to acquire the right to abstain.

88 (87) HERMOGENIAN, *Epitome of Law, book 3:* If, when Primus has been instituted heir in respect of six shares and Secundus in respect of eight, Tertius is instituted heir in respect of the remaining share or without mention of any part [of the inheritance], Tertius will have five twelfths of the inheritance; for if the inheritance is distributed into twenty-four shares, calculation will produce five twelfths for Titius, as if he had been instituted in respect of ten shares.

89 (88) GAIUS, *Cases, sole book:* Where someone is insolvent, it happens in some cases that although there is a slave who is heir with a grant of freedom, there is another heir added as well, for example, if, after the institution of a slave as heir with a grant of freedom, there has been an addition such as, "if Stichus shall be heir to me, then let Titius also be heir"; for Titius cannot be heir before Stichus has become heir under the will, but when once a slave has become heir, the added person cannot bring it about that a person who once becomes heir ceases to be heir.

90 (89) PAUL, *Handbook, book 2:* If a co-owner of a slave has been instituted heir in respect of the whole inheritance and a legacy is left unconditionally to the common slave without [a grant of] freedom, this legacy is not valid. Obviously, a legacy can

effectively be left to him under a condition even without [a grant of] freedom because a legacy even to his own slave can properly be charged on an heir under a condition. And, therefore, [a common slave] will even be able to be instituted heir without [a grant of] freedom where the other co-owner has been appointed heir, like a slave belonging to someone else, because a person's own slave can be instituted heir along with his owner.

91 (90) TRYPHONINUS, *Disputations, book 21:* A slave conditionally instituted heir with [a grant of] freedom in his master's will, while the condition was still unfulfilled, solved the murder of his master and the praetor decreed that he had earned his freedom. Even if the condition in the will is afterward fulfilled, he is free otherwise, that is, through the reward, and not through the will; therefore, he is not *necessarius heres* to his master; however, he is permitted to accept the inheritance voluntarily.

92 (91) PAUL, *Views, book 5:* It is hateful that the emperor should be instituted heir for the sake of litigation, and advantage should not be taken of the imperial majesty in respect of litigation in bad faith.

93 (92) PAUL, *Imperial Decisions Pronounced in Judicial Examinations, book 1 of 6, or Decrees-Imperial Judgments, book 2:* Pactumeius Androsthenes had instituted Pactumeia Magna, the daughter of Pactumeius Magnus, as heir in respect of his whole inheritance and had substituted her father to her. When Pactumeius Magnus had been killed and a rumor had reached him that Pactumeius Magnus's daughter also was dead, he changed his will and instituted Novius Rufus as heir, prefacing the institution as follows: "Because the heirs whom I wished that I might have I could not have, let Novius Rufus be heir." Pactumeia Magna petitioned our emperors and, having held a *cognitio*, although a limitation was placed on the institution, because an erroneous [limitation] does not usually form an obstacle [to an institution], the emperor took the view that, nevertheless, having regard to the testator's wishes, she should be helped. Therefore, he gave judgment that the inheritance belonged to Magna but that she must pay the legacies given in the later will, just as if she herself had been appointed heir in the later will.

6

NORMAL AND PUPILLARY SUBSTITUTION

1 MODESTINUS, *Encyclopaedia, book 2:* Heirs are said to be either institutes or substitutes: institutes [if they are appointed] in the first degree; substitutes, in the second or third. 1. A substitution of an heir is either double or single, for example, "let Lucius Titius be heir; if Lucius Titius does not become my heir, then let Seius be my heir; if he does not become my heir or becomes my heir and has died before reaching puberty, then let Gaius Seius be my heir." 2. We can provide substitutes for our children not only if they are instituted heirs but if they are disinherited and [the substitute can be] not only someone whom we have instituted heir but also another person. 3. A father cannot provide a substitute for his children except where he has instituted someone as his heir; for without an institution of an heir nothing written in a will is valid.

2 ULPIAN, *Sabinus, book 6:* By custom the possibility has been introduced of a person making a will for his children under the age of puberty, until males reach the age of fourteen years and females twelve; and this is to be taken as applying where the children are in [parental] power; but we cannot do this for emancipated children. Certainly, we can [do so] for *postumi*. We can also [do so] for grandchildren and so on, if they are so placed that they will not fall back into their father's power. But if their fathers come before them, it is only possible to provide a substitute for them if they have been instituted heirs or disinherited; for, after the *lex Vellea*, in this way they do not break the will by coming in their father's place; for if the main will has been

broken, the will of the *pupillus* has gone as well. But if a person has appointed an *extraneus impubes* as his heir, he will be able to appoint a substitute to him provided that he has adopted or adrogated him as a grandchild to a son, who will come before him. 1. However, anyone who makes a will for an *impubes* must make one for himself also; but he will not be able [to do so] for an only son, unless perhaps he [the testator] is a soldier. However, the rule that unless he makes [a will] for himself, the will of the *impubes* is not valid goes so far that unless the father's inheritance has also been accepted, the will of the *impubes* vanishes. Certainly, if possession of the inheritance is taken on intestacy, instead of relying on the main will, it must be held that the substitute for the *pupillus* is to be retained as well. 2. Sometimes the instituted heir must be compelled to accept the inheritance for the sake of the will of the *impubes* also, so that a *fideicommissum* under the *secundae tabulae* is validated, as, say, where the *pupillus* has already died; but if he is still alive, Julian thinks that someone who is concerned about the inheritance of a living man is wicked. 3. I think that even if a person under twenty-five years old has been granted *restitutio in integrum* in respect of acceptance of the inheritance, this enures to the benefit of the *secundae tabulae*, so that the praetor decrees *utiles actiones* to the substitute. 4. However, a person must first appoint an heir to himself and then a substitute for his son and not upset the order of the document; and Julian takes this view, that he ought first to appoint an heir for himself and then for his son; but if he makes a will for his son before he makes one for himself, this is not valid. And this view was approved in a rescript of our emperor to Virius Lupus, governor of Britain, and justifiably; for it is agreed that it is one will, although there are two inheritances, and this goes so far that if someone creates *necessarii heredes* for himself, he creates the same persons *necessarii* for his son also and a person can substitute his own *postumus* as heir to his *impubes* son. 5. But if a person has made a will as follows, "if my son has died before his fourteenth year, let Seius be heir," and then says, "let my son be heir," the substitution is valid although he has made his son's will in reverse order. 6. But even if he wrote as follows, "if [my] son does not become my heir, let Seius be heir; let my son be heir," Seius has indeed been appointed heir in the second degree, and if the son has not become heir, undoubtedly he will be heir to him [the testator]; but even if the son has become heir and has died before puberty it seems correct to hold that Seius should be admitted [as heir], inasmuch as it is not the order of the document but of the succession which is looked at. 7. Therefore, what has been said about its being permissible to make substitutions to individuals among one's children has been added to make it clear that one should not begin with the will of an *impubes* son.

3 MODESTINUS, *Distinctions, book 1:* When a father made the following substitution to his *impubes* son, "whoever shall be heir to me, let the same person be heir to my *impubes* son," it was settled that only those appointed [heirs] were admitted to the inheritance in terms of this substitution; therefore, a master, to whom a share of the inheritance was acquired through his slave, will not be able to become heir to the *impubes* through the substitution if the slave has left his power.

4 MODESTINUS, *Advice on Drafting, sole book:* In terms of a *constitutio* of the deified Marcus and Verus, we now apply the rule that when a father has substituted an heir to his *impubes* son in one of the two eventualities, he is regarded as having made a substitution for both eventualities, [namely] whether his son has not become heir or has become heir and has died *impubes*. 1. And this rule is regarded as extending to a third kind of substitution also; for if a father institutes two sons who are *impubes* as heirs and substitutes them reciprocally to one another, the deified Pius laid down by *constitutio* that the reciprocal substitution is to be regarded as having been made for both eventualities. 2. But if one who is *pubes* and another who is *impubes* are substituted to one another by the single expression "and I substitute them reciprocally to one another," Severus and Antoninus laid down by *constitutio* that the substitution should be regarded as having been made for the normal case only; for it appeared incongruous that in the one case the substitution should be double and in the other only a normal one. Therefore, in this case the father will have to make a substitution to each separately, so that if the son who is *pubes* has not become heir, the son who is *impubes* is substituted to him, but if the son who is *impubes* has become heir and has died before puberty, his *pubes* brother is substituted in the share of his co-heir; and

in this case he will be regarded as substituted in both eventualities, so that, if he also makes a substitution to the *impubes* in the normal fashion, he does not leave a question of intention [to be resolved, namely] whether he is understood to have thought of only one normal substitution in respect of each person; for a substitution of both sorts in the one is understood only if this is not opposed to the wishes of the parent. Or, of course, in order to avoid any question, he may substitute his brother to the *impubes* specifically in both eventualities: "whether he does not become heir or becomes heir and has died within the years of puberty."

5 GAIUS, *Lex Julia et Papia, book 3:* If heirs appointed in a will have been so substituted to someone that if that person should not become heir, whoever should be heir to [the testator] should also be heir in respect of the share of the person who did not become heir, it is agreed that anyone who had become heir should be called to the same share in the share of the one who did not become heir as he had obtained in the inheritance and that it does not matter whether that person had been made heir in a greater share by virtue of his institution or that under the statute he had claimed by *vindicatio* the other share of someone else.

6 TERENTIUS CLEMENS, *Lex Julia et Papia, book 4:* If a person who cannot take the whole of what he is given from the property of the testator has been made substitute heir in respect of his [the testator's] *impubes* son, he will take the whole of what he acquires thereby, as if he were taking from the *pupillus*. But to our learned friend Julian, it appears that this rule is to be so interpreted that he cannot take more from the property which had belonged to the testator; but if anything else had been acquired by the *pupillus* or if he had been substituted to him when he [the *pupillus*] had been disinherited, he is not prevented from taking as if he were taking from the *pupillus*.

7 PAPINIAN, *Replies, book 6:* It has been agreed that a substitution to take effect after fourteen years of age, if made in normal legal form, does not operate; but a person who is not admitted as a substitute will sometimes not be heir as an additional heir [either] lest he be made heir against the [father's] wishes, if the son meanwhile does not have the whole of what his father gave him by his will.

8 ULPIAN, *Sabinus, book 4:* A person who makes a substitution to his *impubes* children, usually makes the substitution either unconditionally or conditionally. Unconditionally thus, "if my son has died before puberty, let Seius be heir"; whether this Seius has been instituted heir and substituted to the *impubes*, or whether he has merely been substituted, no condition is imposed on him. But if [the testator] substitutes a person instituted under a condition, that is, "if he becomes my heir," this person will not become heir under the substitution unless he has also been heir under the institution. And the following substitution is similar to this: "whoever becomes heir to me under the provisions set out above"; for it contains in itself the same condition, similar to the one above. 1. The following words, "whoever becomes heir to me, let the same person be heir to my *impubes* son," have this meaning, that not anyone who has become heir to the father, but someone who has become heir under the will, is regarded as substituted; and, therefore, neither a father who has become heir through his son nor a master who has become heir through his slave will be admitted to the substitution, nor the heir of the heir, because they do not base their claim on [the testator's] disposition. Also the substitutes will have the same shares as they had in the inheritance of the head of the household himself.

9 LABEO, *Posthumous Works, Epitomized by Javolenus, book 1:* If a father has instituted as heirs to his *impubes* son the same persons as he has instituted to himself and you as one further heir, you have a half of the property of the son and the other heirs of the father a half in common, so that one half share of the inheritance stays with you and the division of the other half share among the father's heirs is made in the same shares as those which they have in the father's inheritance.

10 ULPIAN, *Sabinus, book 4:* But if several persons have been appointed substitutes as follows, "whoever becomes heir to me in terms of the provisions above-written" and then some of them have died after they became heirs to the father, only the survivors will be heirs under the substitution in proportion to the shares in respect of which they were instituted, nor will anything take effect in relation to those who died. 1. Those whom I can make *necessarii heredes* to myself I can also make *necessarii heredes* to my son, such as my slave and his [my son's] brother, although he is not yet in being; the *postumus*, therefore, will be *heres necessarius* to his brother. 2. A person is substitute to an *impubes* son who

has been instituted heir in respect of the whole inheritance; the son has become heir to his father; can the substitute separate the inheritances so that he has that of the son but not that of the father? He cannot but must have the inheritance of both or of neither; for it has become a united inheritance. 3. And it is the same if the father has appointed me heir in respect of a share and his son in respect of a share and I have rejected the father's inheritance; for I cannot have the son's inheritance either. 4. If a person instituted heir in respect of the whole inheritance and substituted to a disinherited son has rejected the father's inheritance when he did not have a substitute, he will not be able to accept the son's inheritance; for the son's will is not valid unless the father's inheritance has been accepted; for it is not sufficient to give force to the *secundae tabulae* that the [father's] will was so made that the inheritance could have been accepted under it. 5. Substitutes to *pupilli* are entitled also to anything which has come to the *pupilli* after [the death of the father]; for the testator does not substitute them in respect of his own property, but in respect of that of the *impubes*, as a person can provide a substitute even for a disinherited [child], unless you put to me the case of a soldier who has provided a substitute heir with the intention that only what has come from him to the institute is to belong to the substitute. 6. In the case of an *impubes* adopted by *adrogatio* also, we say that a substitute of his, appointed by the *adrogator*, should not be entitled to what he would have if he had not been so adopted but only to what the *adrogator* himself gave to him, unless perhaps we distinguish, in the sense that certainly the substitute cannot have the quarter which [the *adrogator*] in terms of the rescript of the deified Pius ought in every case to leave to him, [but] has the excess. But Scaevola, in the tenth book of his *Questions*, thinks that even this should be allowed to the *adrogator*, and this view is reasonable. I would go even further and think that if he has acquired anything by means of the *adrogator*, the substitute can have this as well, as, say, where a friend or cognatic relative of the *adrogator* has left him something. 7. No one instituted and substituted to himself gets any advantage thereby without some change in the basis of the appointment, but this applies [only] within one degree; but if there are two degrees, it can be held that the substitution is valid, as Julian thinks in the thirtieth book of his *Digest*; [holding that] certainly, if someone has been substituted to himself in the following fashion, when he had Titius as his co-heir, "if Stichus does not become heir, let him be free and heir," the substitution is not valid; but if it takes this form, "if Titius does not become heir, then let Stichus be free and heir, in his share also," there are two degrees, and, therefore, if Titius rejects [the inheritance], Stichus will be free and heir.

11 PAUL, *Sabinus, book 1:* If a person who has been instituted heir has been substituted to a son, it will not prejudice him in the substitution if he can take [the inheritance] at the time the son has died. Against this, he can also suffer penalties in the will of the *pupillus* although he did not suffer them in that of the father.

12 PAPINIAN, *Questions, book 3:* If a son who has become heir to his father and afterward, under *secundae tabulae*, to his brother refuses the inheritance of his father but prefers to keep that of his brother, he ought to be heard; for I think the praetor would act more justly if he granted the brother separation of his father's property. For the object in exercising jurisdiction [to grant separation] has been to free children from burdens attached to an inheritance not voluntarily undertaken, and not to remove those unwilling to have it from the inheritance, especially as he would have his brother's inheritance as *legitimus heres* if the *secundae tabulae* were taken out of the reckoning. Therefore, only the legacies under the *secundae tabulae* need be paid, taking account, in relation to the *lex Falcidia*, of the means not of the father, as is otherwise usually the case, but of the *impubes*.

13 POMPONIUS, *Sabinus, book 1:* It does not matter in what degree a substitute heir is provided for children.

14 POMPONIUS, *Sabinus, book 2:* In the case of a substitution to a *pupillus*, although it has covered a lengthy period of time, the substitution will end with [the child's] puberty.

15 PAPINIAN, *Replies, book 6:* A centurion appointed a substitute heir directly to his sons if they died without children before their twenty-fifth year. The substitute to a son, before [the son's] fourteenth year, will take his [the son's] own property as well under the general law, but after that age, by the privilege of soldiers, he will take only such property of the father as may be found in the inheritance with the fruits thereof.

16 POMPONIUS, *Sabinus, book 3:* If a person who has left a legacy of a slave in his will, then,

in relation to a substitute to his son, has ordered him to be free, the slave will be free, the legacy being treated as adeemed; for in the case of a legacy also, in these wills the last thing written must be looked at, just as would happen in the same will (or in a will and confirmed codicil). 1. If, after making his own will, a father has then made a will for his son at a different hour, using the witnesses required by law, that will nonetheless be valid, and yet the father's testament will stand confirmed. For even if the father had made a will for himself and his son and then for himself only, both the earlier wills will be broken. But if the father has made the second will in such a way that he institutes an heir for himself if his son dies in his lifetime, it can be held that the earlier will is not broken because the second in which the son has been passed over is not valid.

17 POMPONIUS, *Sabinus, book 4:* There can be substituted to children even a person who has been born after the death of the person to whom he has been substituted as heir.

18 ULPIAN, *Sabinus, book 16:* If a common slave has been substituted to an *impubes* with [a grant of] freedom, if, in fact, he had been bought up by the head of the household, he will be *necessarius* [*heres*] to the *impubes*; but if he had been brought up by the *impubes*, he will not be a *necessarius*, but a voluntary heir, as Julian writes in the thirtieth book of his *Digest*; but if he has been brought up neither by the head of the household nor by the *impubes*, reasoning from equity suggests that if he himself offers the price of [the other] share of himself to his [other] master, he can acquire both his freedom and the inheritance. 1. If a slave has been left by legacy to Titius, he can be substituted to an *impubes* with a [grant of] freedom, just as he could be instituted, and the legacy disappears if the condition on the substitution is fulfilled.

19 JULIAN, *Digest, book 30:* The same applies even if the slave has been substituted after the death of the legatee.

20 ULPIAN, *Sabinus, book 16:* The will of a father and his son are treated as one by praetorian law also; for as Marcellus writes in the ninth book of his *Digest*, it is sufficient if the will of the father has been sealed, even if that of the son has been resealed, and the father's seven seals are sufficient. 1. If a father has made a will for himself in writing and for his son by oral declaration or the other way around, this will be valid.

21 ULPIAN, *Edict, book 41:* If a person made a substitution as follows, "if my son has died before his tenth year, let Seius be heir," and then this son died before his fourteenth year but after his tenth, the preferable view is that the substitute cannot claim *bonorum possessio*; for he does not appear to have been substituted in this particular case.

22 GAIUS, *Provincial Edict, book 15:* A person who has claimed *bonorum possessio* against his father's testament, if he has been substituted to his *impubes* brother, is kept out of the substitution.

23 PAPINIAN, *Replies, book 6:* A person who instituted several heirs wrote as follows: "And I substitute them all to one another reciprocally." If, after the inheritance has been accepted by certain of these heirs and one of them has died, the condition on the substitution is fulfilled, and another heir has rejected his share [of the inheritance], the whole share will belong to the survivors because the individual heirs will be regarded as substituted to one another reciprocally in every situation; for where someone institutes heirs and writes as follows: "And I substitute them to one another reciprocally," it is those who have become heirs who will be regarded as substituted.

24 ULPIAN, *Disputations, book 4:* If several persons have been instituted in respect of different shares and all have been substituted to one another reciprocally, it is generally to be accepted that they have also been substituted in respect of the same shares as they have been instituted. Thus, if, say, one has been instituted for one twelfth, a second for eight twelfths, and a third for a quarter, if the third rejects [his share of the inheritance], the quarter is divided into nine shares, and the one who had been instituted in respect of two thirds will take eight shares, and the one who was appointed in

respect of one twelfth will take one share, unless perhaps the testator had some other intention, which is scarcely to be accepted unless it was clearly expressed.

25 JULIAN, *Digest, book 24:* If a father has substituted sons who are *impubes* to one another reciprocally and has substituted Titius to the one who died last, the advice to be given is that only the brothers will receive *bonorum possessio*, and in a certain sense two degrees have been created in this institution: in the sense that first the brothers were substituted to one another and, if they should not be in existence, then Titius was called.

26 JULIAN, *Digest, book 29:* If a father has appointed his *impubes* son heir and substituted to him anyone who should be born to him after [his, the son's] death and then a *postumus* has been born in his brother's lifetime, the testament will be broken; however, one born after his brother's death in the lifetime of his father will be sole heir to his father.

27 JULIAN, *Digest, book 30:* If Titius has been substituted to his co-heir and then Sempronius has been substituted to him, I think that the more correct view is that Sempronius has been substituted in respect of both shares.

28 JULIAN, *Digest, book 62:* The *lex Cornelia* which confirms the wills of those who have died in captivity does not relate only to the inheritance of those who themselves have made wills but to all inheritances which could have belonged to anyone as a result of their will, if they had not fallen into captivity. And on this account, when a father has died in captivity, leaving an *impubes* son in the *civitas*, and he has died under puberty, the inheritance belongs to the substitute, just as if the father had not fallen into captivity. But if the father has died in the *civitas* and the *impubes* son in captivity, if, in fact, the son fell into captivity after the father's death it is held, not inconveniently, that his inheritance belongs to the substitutes in terms of that statute; but if the son fell into captivity in his father's lifetime, I do not think that the *lex Cornelia* applies, because it does not have the effect of allowing someone who has left no property in the *civitas* to have heirs. And, therefore, even if a *pubes* son has been captured in the lifetime of his father and then has died in captivity after the death of his father within the *civitas*, the father's inheritance belongs to the nearest agnate under the *Twelve Tables*, not the son's under the *lex Cornelia*.

29 SCAEVOLA, *Questions, book 15:* If a father has been captured by the enemy and then his son, and both die in captivity, although the father dies first, the *lex Cornelia* will not apply to the substitution of the *pupillus*, unless the *impubes* dies after returning to the *civitas*, because, even if both had died within the *civitas*, the substitute would come in.

30 JULIAN, *Digest, book 78:* A certain man in his will instituted Proculus in respect of a quarter share and Quietus in respect of three quarters and then substituted Florus to Quietus and Sosia to Proculus; then, if neither Florus nor Sosia became heirs, he substituted in the third degree the colony of the *Leptitani* in respect of three quarters, and in addition he appointed several substitute heirs in respect of more than three twelfths; Quietus accepted the inheritance, Proculus and Sosia died in the lifetime of the testator; the question is asked whether the quarter given to Proculus belongs to Quietus or to the substitutes in the third degree. I replied that it appeared to have been the wish of the head of the household that he substitute the heirs appointed in the third degree only if the whole inheritance had become vacant and that appeared clearly from the fact that he had distributed more than twelve twelfths among them and that, therefore, the quarter share of the inheritance about which the question is raised belonged to Quietus.

31 JULIAN, *Ambiguities, sole book:* In the case of a substitution to a son made in the following manner, "whoever is heir to me under the above-written provisions let the same person be heir to my son," the question is asked whether "whoever is heir" is to be understood as meaning "whoever is at any time heir" or "whoever is heir at the time when my son dies." It has been agreed among the jurists that [it means] "if he

had been heir at any time"; for although he had ceased to be heir in the lifetime of the *pupillus*, say, because of a complaint of an undutiful will which has been raised in respect of his share, it has been accepted that he nevertheless will be heir under the substitution. 1. The same view should not be held in the following case: If a person, when he had two sons, Gaius, who was *pubes*, and Lucius, who was *impubes*, had made a substitution to his son in the following way, "if Lucius my son has died *impubes* and Gaius [my] son does not become my heir either, then let Seius be my heir"; for the jurists have interpreted this in the sense that the condition of the substitution should be referred to the death of the *impubes*.

32 JULIAN, *Urseius Ferox, book 1:* A man who had instituted several heirs in unequal shares, and among them Attius, if Attius did not accept [the inheritance], had substituted to him the other heirs in the same shares as those in which he had instituted them; then, if Attius had not accepted, he added Titius as co-heir to those whom he had made substitute heirs. The question was asked what share he, and what share the others, would have. I replied that Titius would have a per capita share, the others their shares in the inheritance; for example, if there had been three, Titius would have a quarter of Attius's quarter share, and the remaining heirs would have the shares to which they had been instituted in the inheritance in the remaining shares [of Attius's quarter share]. But if he had added not only Titius but also other heirs, these would certainly have per capita shares; for example, if, say, three co-heirs had been substituted and two outsiders had been added, he said that these two would have one fifth shares in Attius's share, while the remaining co-heirs would have the shares they had in the inheritance.

33 AFRICANUS, *Questions, book 2:* If a mother makes her will in such a way that she institutes her *impubes* son heir when he is fourteen years old and substitutes someone else to him in a pupillary will if he does not become her heir, the substitution is valid. 1. If a son and a *postumus* grandson through him are instituted heirs in the way approved by Gallus Aquilius and Titius is substituted to the grandson if he does not become heir, he [Julian] replied that if the son becomes heir, Titius is altogether excluded, that is, even if a grandson has not been born.

34 AFRICANUS, *Questions, book 4:* A person substituted an heir to the one of two *impuberes* who should die last. I replied that if they both died simultaneously, he would be heir to both, because "last" is understood as meaning not only the person who comes after someone else but also the person after whom there is no one, just as, on the other hand, the "nearest" is understood as meaning, not only the person who becomes before someone else but also the person before whom there is no one. 1. A person instituted an *impubes* son and Titius as heirs; he substituted Maevius to Titius and substituted to his son whoever should be heir to himself under the above-written provisions. Titius did not accept the inheritance; Maevius accepted it. He [Julian] thinks that if the son then dies, the preferable view is that under the substitution the inheritance of the *pupillus* is offered only to the person who has also accepted the inheritance of the father. 2. Even if *bonorum possessio* has been claimed against the father's testament, a pupillary substitution is nevertheless valid, and the legacies which have been charged in respect of the substitution are to be paid to all persons [to whom they are due].

35 AFRICANUS, *Questions, book 5:* Even if *bonorum possessio* has been claimed by a *pupillus* against his father's testament, nevertheless, the action for a legacy should be given against the substitute to him so that they [legacies] are increased, apart from those legacies which cannot be claimed because of the fact that the son will not have had to pay those due to *extranei*. In the same way, legacies left charged on the substitute also grow, if more had come to the son through the *bonorum possessio*, just as the son himself would owe more to the specified persons. I think that it follows from the above that if an *impubes* has been appointed [heir] in respect of the whole inheritance and a half share of the inheritance has been taken from him through *bonorum possessio*, the substitute would be relieved in part of claims in respect of legacies, so that, in the same way as a share which has come in through *bonorum possessio* increases legacies, here what has gone diminishes [them].

36 MARCIAN, *Institutes, book 4:* A person can make several degrees of heir in his will, as, say: "If 'X' does not become heir and 'Y' does not become heir, let 'Z' be heir," and so forth through several persons, so that he finishes by instituting, as a precaution, even a slave as *necessarius heres*. 1. And either several persons can be substituted in place of one or one

in place of several or individuals in place of individuals or those who have themselves been instituted heirs can be substituted to one another reciprocally.

37 FLORENTINUS, *Institutes, book 10:* An heir can be substituted either to individual children or to the last of them to die: to individuals if [the testator] wishes none of them to die intestate; to the last if he wishes their respective rights of succession as *legitimi heredes* to operate untouched.

38 PAUL, *Secundae Tabulae, sole book:* A person who has several children can provide a substitute to certain of them, and it is not at all necessary to provide a substitute for all, just as he can provide no substitute for any of them. 1. Therefore, it is also possible to provide a substitute for a short period of time, such as say, "if my son has died before his tenth year, let Titius be heir to him." 2. Therefore, even if he provides different substitutes after the end of a period, this will be admissible, for example, "if he has died before his tenth year, let Titius be heir; if after his tenth and before his fourteenth year, let Maevius be heir." 3. If a person instituted by a father and asked to hand the inheritance over has accepted under compulsion as one under a *fideicommissum*, although the other bequests which have been made in the same will are confirmed through this acceptance, such as legacies and grants of freedom, nevertheless, our learned friend Quintus Cervidius Scaevola used to say that the *secundae tabulae* should not be revived as the will has now been left without an heir by civil law. But most authorities are of a different opinion, because the will of the *pupillus* is also part of the earlier will, and this is the rule we follow.

39 JAVOLENUS, *From the Posthumous Works of Labeo, book 1:* When a man had two *impubes* grandsons through a son but one of them was in parental power and the other was not, and he wanted to have both of them as heirs in equal shares and, if either of them had died *impubes*, to transfer his share to the other; following an advisory opinion given by Labeo, Ofilius, Cascellius, and Trebatius, he made the one whom he had in his power sole heir and charged on him in favor of the other a legacy of a half share of the inheritance when he had reached full age; but if the one who was in his power had died *impubes*, he substituted the other to him. 1. We can substitute to an *impubes* son different heirs according to individual circumstances, [providing] for example, that one person should be heir if one should have no son and another if one should have a son and he has died *impubes*. 2. A certain person had appointed four heirs and had provided a substitute to all the heirs except one; that one to whom no one had been substituted and one of the others had died during the lifetime of the head of the household. Ofilius and Cascellius [when consulted] replied that the share to which no one had been substituted belonged to the substitute also, and their view is correct.

40 PAPINIAN, *Questions, book 29:* After the *cognitio* had been held, an *impubes* who was adopted by *adrogatio* had died. In the same way as account is taken of the interests of the *legitimi heredes* by imposing, under imperial authority, the bond of a *cautio*, so if it happens that the natural father has made a substitution to the *impubes*, assistance will be given to the substitute; for no actions other than *actiones utiles* can be granted even to those who will be *legitimi heredes*.

41 PAPINIAN, *Replies, book 6:* A person substituted to his co-heir died before he accepted the inheritance or the condition on the substitution was fulfilled. Both shares will belong to his substitute, whether he was substituted before the substitution or afterward, and it will not matter whether the earlier substitute dies after the institute or before him. 1. In terms of the words, "I substitute them to one another reciprocally," the share of one who does not accept [the inheritance] is offered to the appointed heirs in proportion to the respective shares acquired for themselves or for someone else. 2. Where a parent has made a substitution to a daughter or to a grandson who took the place of a son or came to take it after the will, if any of these was not in the family at the time of the death also, the pupillary substitution becomes void. 3. But if a father has asked his son, who is his heir, if he should die *impubes*, to hand over his inheritance to Titius, it has been settled that the *legitimus heres* of the son is to be compelled, subject to the *lex Falcidia*, to hand over the father's inheritance as if a *fideicommissum* had been charged on the *impubes*, taking effect after his death, nor is any other rule to be followed when the condition of the substitution goes beyond the age of puberty, using precatory words. And this will apply if the father's

will was legally valid; otherwise, if it was not valid, that writing which he intended to be a will, will not make a codicil, unless this was expressly stated. Nor will the son's own means be affected by the *fideicommissum*, and, therefore, if the father has disinherited his son and left him nothing, there will be no *fideicommissum*; otherwise, if the son has received legacies or *fideicommissa*, within the measure of them the *fideicommissum* of the inheritance charged on the son will be due, taking into account the *lex Falcidia*. 4. A person who has given discrete shares separately to several people jointly and, after the whole arrangement of the institution, has written, "and I substitute these my heirs to one another reciprocally," is regarded as having, in the first instance, made a mutual substitution to one another of those jointly instituted; and if these do not accept their shares of the institution, all the other co-heirs are admitted. 5. A person who had instituted a father and son as heirs in respect of a share and had substituted them to one another reciprocally, having appointed the other co-heirs, and after disposing of the whole inheritance, wrote as follows: "All of these I substitute to one another reciprocally." It becomes a question of intention [whether] by the mention of "all" he added the father and son into the substitution of co-heirs or applied that phrase to all the others; and the latter seems the more probable in view of the special substitution between father and son. 6. A co-heir appointed with an *impubes* son and substituted to him will pay legacies left by the *secundae tabulae* just as if he had received one share unconditionally and the other conditionally. The same rule will not be applied if someone else is substituted; for he would bring in the *lex Falcidia* as being obviously instituted heir in the main will under a condition, although it might well be that the co-heir appointed to the son obtained a whole quarter share. For even when a legacy is given in the main will to Titius, but in *secundae tabulae* the same thing [is given] to Sempronius, Sempronius sometimes comes in with Titius. 7. Where a father had made *secundae tabulae* for the *impubes* daughter of his who was the last to die and an *impubes* daughter had died survived by a *pubes* sister, it was settled that the substitution had become void: in respect of the former, because she had not died last, but in the case of the latter, because she had reached puberty. 8. It has been settled that a substitution made in the following words is not to be regarded as having been made defectively: "If that son of mine has died before the years of puberty ([a thought] which I abominate), then let Titius be heir in place of him or in respect of his share," any more than if, after setting out the condition, he had ordered him to be his substitute heir; for even someone who is instituted heir in respect of a particular thing, if no co-heir is appointed, obtains the inheritance of all the property.

42 PAPINIAN, *Definitions, book 1:* A man who had left two *impuberes* sons as his heirs, made a substitution, if both had died; then the boys died simultaneously after the father's death; two inheritances are offered to the substitute. But if they die at different times, the substitute will find in the inheritance of the last boy [to die] the inheritance of his brother who died before; but in making the calculation for the *lex Falcidia*, the inheritance of the former boy will not come into the reckoning, nor will the substitute claim more than an eighth by virtue of the will; the legacies also which were charged on the substitute of the son who died first intestate lapse into nullity.

43 PAUL, *Questions, book 9:* This case which happened has given rise to a question: A man who had a son who was dumb and *pubes* obtained from the emperor the privilege of providing a substitute to the dumb son and made Titius substitute heir; the dumb son took a wife after his father's death, and a son is born to him; I ask whether the will is broken. I replied: It is, in fact, the emperors themselves who usually interpret imperial privileges; but to those divining the intentions of the emperor, it can be said that he intended the privilege to extend for as long as [the testator's] son had remained in the same state of health so that, just as at civil law the will of a *pupillus* is ended by puberty, so the emperor was guided by the law in dealing with a person who cannot make a will because of infirmity. For even if he had made a substitution to an insane son, we would hold that the will ceased to be valid when he had recovered his sanity, because he could then make a will for himself; for the privilege of the emperor begins to become unjust, if we should hold that it continues to be valid; for it would take away

testamenti factio from a man of sane mind. Therefore, it must be held that the substitution will also be broken by the addition of a *suus heres* to the agnatic family because it does not matter whether the son himself instituted another heir afterward or he came to have a *suus heres* by [operation of] law. For it is not probable that either the father or the emperor had thought of this case, or intended the child who was born afterward to be disinherited. And it does not matter in what way the imperial privilege intervenes in the matter of *testamenti factio*, whether in favor of one person or several. 1. Again, I ask if a substitution made as follows is in question: "If my son has died before his tenth year, let Titius be heir, if he has died before his fourteenth, let Maevius," and the son has died at the age of eight, will Titius alone be heir to him under the substitution, or Maevius also, because it is certain that the son died both before his tenth and his fourteenth year? I replied that certainly the whole space of time before the age of puberty is available to a father to make a substitution to his son, but puberty puts an end to this; however, the preferable view is that in the case of each of them his own time was separately provided for, unless it is clearly shown that the intention of the testator was otherwise. 2. Lucius Titius, when he had sons in parental power, appointed his wife as his heir and substituted his sons to her; the question was asked whether the institution of the wife is of no effect, for the reason that the sons had not been disinherited in respect of that degree. I replied that that degree in respect of which the sons were passed over was of no effect, and, therefore, as they are also stated to have been appointed substitute heirs, they are regarded as having become heirs under the will, because, namely, the sons do not upset the whole will, but only that degree which from the beginning was not valid, just as has been advised if a son has been passed over in respect of the first degree and disinherited in respect of the second; however, it does not matter for what reason the institution of the second heir is valid, whether because the son has been disinherited in respect of it or because the son himself has been made substitute heir. 3. Julius Longinus the Elder substituted to his son the persons whom he had instituted heirs to himself in the terms: "whoever was heir to him"; if one of the instituted heirs, who had secretly undertaken to give to someone who could not take from the inheritance a share of what he [himself] had received, has been included in the substitution to the *impubes*, does he come in for the share which he took, or, instead, for the share in respect of which he was appointed [heir], so that his share in the substitution is increased? I replied: A person who gives an undertaking in fraud of the laws by accepting [the inheritance] becomes heir, and he will not cease to be heir although the property which has been left [to him] is taken away. And so he can be heir under the *secundae tabulae* also to the extent to which he was appointed; for he has been sufficiently punished in the matter in which he acted against the statutes. Indeed, to go further, even if he ceased to be heir, I would say the same; in the same way as we must understand the case of a man who, when he had been appointed heir, was reduced into slavery after he had accepted the inheritance and was afterward gifted his freedom. For he was allowed to take up the substitution which had been left to him in the will; for although he has lost the inheritance under the institution, nevertheless, he will take that same share under the substitution, as much as he lost.

44 PAUL, *Questions, book 10:* Maecianus has written that the previous principal will cannot be confirmed in whole or in part by means of the will of the *pupillus*.

45 PAUL, *Replies, book 12:* Lucius Titius instituted his lawful son and another natural son as heirs and substituted them to one another reciprocally; Titianus, the lawful son, whom his father left as a year-old child, died *impubes* after his father's death, survived by his mother and the natural brother, whom he also had as his co-heir; does his inheritance belong to Titius, his natural brother, in virtue of the substitution or rather to his mother? I replied that the substitution in question related to the first case of nonexistence of heirs, not to the following one, if either of them had died afterward before puberty, as, in the case of the natural son, a double substitution could not take place; and, therefore, the inheritance will belong to the mother of the lawful son on intestacy. 1. Paul advised that if all the instituted heirs had been substituted to one

another reciprocally the share of one who, after certain of them had died, thereafter rejected his share belonged under the substitution to the only one who survived at that time.

46 PAUL, *Replies, book 13:* The head of a household, having instituted a *postumus* as heir in his main will, in *secundae tabulae* substituted his brother Gaius Seius to himself and to his son, if he had died before puberty, and then [substituted] Titius to Gaius Seius, and thereafter he wrote as follows: "But if Gaius Seius my brother, who is substituted in the first place, should be heir to me, then I leave a *fideicommissum* to Titius." The son became heir to his father, and as he died before puberty, the brother of the testator is heir under the substitution; is the *fideicommissum* due, since it was left in such a way [as to be exigible] if Gaius Seius his brother became his heir? I replied that the brother of the deceased, who was instituted or substituted in both eventualities, when the son died *impubes*, ought to pay the bequests which the testator left; and these words, "but if Gaius Seius is heir to me, then I wish there to be given," were not inconsistent with this, as it is true that he also became heir to the testator.

47 SCAEVOLA, *Replies, book 2:* A man, who had a son and a daughter who were both *impubes*, having instituted the son as his heir, disinherited the daughter and substituted the daughter to the son if he had died before reaching puberty; but he substituted to the daughter, if she had died before she married, his wife and also his sister. Since the daughter died first while *impubes* and then her brother while *impubes*, I ask whether the inheritance of the son belongs to the wife and sister of the testator by right of substitution. I replied that according to the facts set forth, it did not [so] belong.

48 SCAEVOLA, *Questions Publicly Discussed, sole book:* We have a common slave; this man is appointed heir, and if he is not heir, Maevius has been substituted to him; he has accepted the inheritance on the instructions of one of his masters but not on those of the other; the question is asked whether the substitute comes in or not. And the more correct view is that the substitute does come in. 1. "Let Titius be heir. I give and bequeath Stichus to Maevius; let Stichus be heir; if Stichus does not become heir, let Stichus be free and heir." In this question it must first be asked whether there is one degree [of heirs] or two and whether the basis of the substitution has been changed or remains the same. And, indeed, in most authorities the question is asked whether someone can be substituted to himself, and the reply given is that he can, if the basis of the substitution has been changed. Therefore, if Titius has been appointed heir, and if he does not become heir, the same Titius has been authorized as heir the substitution will be of no effect. But if someone has been appointed heir under a condition, but has been substituted unconditionally, the basis is changed, because the condition affecting the institution can fail and the substitution can contribute something; but if the condition has been fulfilled, the two are unconditional, and, therefore, the substitution will be of no effect. Conversely, if someone is instituted unconditionally and then substituted to himself under a condition, the conditional substitution does nothing and is not regarded as changed, because, after all, even if the condition is fulfilled, there are two unconditional institutions. In accordance with this, the question put will be made clear: "Let Titius be heir; I give and bequeath Stichus to Maevius; let Stichus be heir; if Stichus does not become heir, let Stichus be free and heir." We teach that because Stichus has both been bequeathed and received his freedom in the same will, the [grant of] freedom prevails, and if the [grant of] freedom prevails, the legacy is not due, and, therefore, he cannot accept the inheritance on the instructions of the legatee, and in consequence of this, it is true that Stichus is not heir, and in terms of the following words freedom is available to him, as there appears to be one degree [of heirs]. What, then, if Titius has not accepted [the inheritance]? By the substitution Stichus will then become free and heir. Indeed, so long as he does not accept [the inheritance] on the instructions of the legatee, he is not regarded as having been made the property of the legatee on the basis of the legacy either, and, therefore, it is certain that he is not heir, and, in consequence of this, in terms of the following words, "if

he does not become heir, let Stichus be free and heir," he will be free and heir. However, this view which we take Julian also approves in his writings. 2. If a *pupillus* has alienated a slave who has been substituted to him and the purchaser has instituted him [the slave] free and heir, does that man in the substitution have a universal substitute [status]? So that if, in fact, the *pupillus* has reached puberty, he [the slave] has become *necessarius heres* under the purchaser's will, but if he [the *pupillus*] has died before puberty, he [the slave] is indeed free and heir under the substitution and *necessarius heres* to the father of the *pupillus*, but has become voluntary heir to the purchaser.

7

CONDITIONS ON INSTITUTIONS

1 ULPIAN, *Sabinus, book 5:* It is settled that an institution made under an impossible condition or with some other blunder is not vitiated.

2 ULPIAN, *Sabinus, book 6:* If there has been included in a will [the phrase] "let that slave, if he is mine" (or "who is mine") "when I die, be heir," the question is asked in what sense "mine" is to be taken. And if, in fact, he [the testator] alienated the usufruct in him, nevertheless, he [the slave] remains his property; but if he alienated a share in him, the question is asked whether the condition on the institution fails. And the more correct view is that the condition has not failed unless it has appeared by the most evident proofs that the testator intended these words to have been inserted as a condition meaning this: "if the whole slave remained in his ownership"; for then if a share has been alienated, the condition fails. 1. But if two slaves have been instituted heirs as follows, "let Primus and Secundus, if they be mine when I die, be free and heirs," and one of them has been alienated, Celsus rightly thinks that this is to be taken in the sense that he had instituted the individual slaves as heirs separately under the same condition.

3 PAUL, *Sabinus, book 1:* If I have been instituted heir thus, "if I have given ten," and the person to whom I was ordered to give it refuses to accept it, the condition is treated as fulfilled.

4 ULPIAN, *Sabinus, book 8:* If persons have been instituted as follows, "if they have remained together as partners in my property for sixteen years, let them be heirs," Marcellus says that the institution is invalid according to the proper meaning of the words; however, Julian [holds] that the institution is valid because the partnership can be entered into even before acceptance of the inheritance, as being in respect of a future thing, which is correct. 1. The same Julian writes that a person who has been instituted heir as follows, "if he has not alienated a slave belonging to the inheritance," he can fulfill the condition by giving a *cautio* to his co-heir; but if he has been appointed sole heir, he is regarded as having been instituted heir under an impossible condition; and this view is correct.

5 PAUL, *Sabinus, book 2:* If several conditions have been imposed on an heir jointly, all must be met, because they are treated as one; if they have been [imposed] severally, any one of them [must be met].

6 ULPIAN, *Sabinus, book 9:* If a person was instituted thus, "if he had erected a monument after the testator's death, in the three days next after his death," where the monument cannot be completed in three days, it will have to be held that the condition disappears, as being impossible.

7 POMPONIUS, *Sabinus, book 5:* Where a person had instituted heirs under the condition that they had given each other *cautiones* that they would pay the legacies left in that will, it is settled that they will be relieved of the condition because it was aimed at committing a fraud on the statutes which prohibit certain persons from taking legacies; although even if a *cautio* had been given, the promisor would have had to be protected in the action itself by a defense.

8 ULPIAN, *Edict, book 50:* Provisions which are made in a will under the condition of [swearing] an oath are disapproved by the praetor; for he has provided that a person

who has accepted something under the condition of [swearing] an oath should not either lose the inheritance or legacy by not fulfilling the condition or be compelled, by accepting the condition, to swear basely; he, therefore, has decided that a person to whom something has been left under the condition of [swearing] an oath should take in the same way as those in respect of whom no such condition of [swearing] an oath is inserted take and rightly; for as there are some among men who in their contempt of religion are ready to swear, and others who in their fear of the divine power, are extremely timid, to the extent of superstition, the praetor has most advisedly intervened so that neither the former should obtain nor the latter should lose what was left [to them]. For a person who wished what he insists be done under the condition of sanctity [of an oath], [actually] to be done, could have left [the bequest] under the condition of doing it; for in this way, men would either by doing [the act] be allowed to have [what was left] or by not doing it would fail to meet the condition. 1. This edict relates also to legacies and not only to the institution of heirs. 2. In the case of *fideicommissa* also, those who deal by *cognitio* with the *fideicommissum* will require to follow the praetor's edict, for this reason, that *fideicommissa* fulfill the function of legacies. 3. And in the case of gifts *mortis causa*, it must be held that the edict applies, if it happens that someone has given a *cautio* that he will give back what he has received if he has not sworn that he will do something; therefore, it will be necessary to release him from his *cautio*. 4. If someone has been instituted [heir] under the condition of [swearing] an oath and also under another [condition], it must be considered whether the condition is released in these circumstances; and the preferable view is that the condition of [swearing] an oath ought to be released, although he has to fulfill the other condition. 5. But if he has been instituted under the condition of [swearing] an oath or if he has given ten thousand, that is, with the condition as an alternative, so that he fulfills the condition or swears something else, it is to be considered whether he ought not to be released from the condition, because he can escape trouble by fulfilling the other condition. But it is the more correct view that the condition should be released, lest on other reasoning the other condition encourages him to swear the oath. 6. Whenever an heir is ordered to swear that he will give something or do something which is not dishonorable, he will not have the actions in respect of the inheritance except if he has given or done what he had been ordered to swear [to give or do]. 7. However, if Stichus is dead or has been manumitted in the lifetime of the testator, a person who has been instituted heir if he has sworn that he would manumit Stichus is not regarded as having failed to meet the condition as heir although it is true that he would be compellable to manumit him if he were alive. The same applies even if the heir has been instituted as follows, "let Titius be heir provided that he manumits Stichus" or "I leave a legacy of a hundred to Titius provided that he manumits Stichus." For if Stichus is dead, no one will hold that he is to be turned away; for he is not regarded as having failed to meet the condition, if he cannot fulfill it; for [the testator's] wish is to be fulfilled if it can be. 8. It is not necessary to go to the praetor to have this [sort of] oath released; for it has been released once for all by the praetor and does not require to be released by individual [praetors]. And, therefore, it is regarded as released from the time when a legacy has vested even if the appointed heir does not know of this. And, therefore, in the case of the heir of the legatee, the view rightly approved is that if the legatee has died after the legacy has vested, his heir ought to bring the action on the legacy, as if an unconditional legacy had been left to the person to whom he had become heir.

9 PAUL, *Edict, book 45:* Conditions which are inserted against sound morals are to be released, such as, "if he has not redeemed his father from captivity," "if he has not provided maintenance for his parents or his patron."

10 ULPIAN, *Disputations, book 8:* An institution, such as this, "if I have appointed Seius heir in a codicil, let him be heir," is not invalid in the case of any one instituted heir other than a son; for it is a conditional institution. Nor is the inheritance regarded as given by codicil, which is forbidden, but this is a conditional institution which was made by will. Hence, even if he made the appointment as follows, "let the person be

heir to me whose name I shall write in a codicil," by parity of reasoning it will have to be held that the institution is valid, there being no law preventing this. 1. If we suppose someone instituted as follows, "let him be heir if I have appointed him heir by codicil," the institution is valid even in the case of a son who is in parental power, whereas a condition which is related to the past or which [is related] to the present, such as, "if the king of the Parthians is alive," "if a ship is lying in the harbor," is null.

11 JULIAN, *Digest, book 29:* If a person has written his will in the following manner, "let my son be heir if he has adopted Titius; if he has not made the adoption, let him be disinherited," and Titius is unwilling to give himself in *adrogatio* to the son who is prepared to adopt him, the son will be heir as if the condition had been fulfilled.

12 HERMOGENIAN, *Epitome of Law, book 3:* The following words, "let Publius Maevius, if he wishes, be heir," make a condition in the case of a *necessarius heres*, so that if he does not wish [to do so], he does not become heir; for in the situation where an heir is voluntary, it is pointless to add them, as, even if they were not added, a person who does not wish to do so does not become heir.

13 JULIAN, *Digest, book 30:* Neither an inheritance nor a legacy can be acquired by a person who has received the inheritance or the legacy, "if he has given ten" unless, after fulfillment of the condition, the person appointed heir or the legatee has done an act whereby an inheritance or a legacy is normally acquired.

14 MARCIAN, *Institutes, book 4:* Conditions which are framed against edicts of the emperors or against statutes or provisions which have the force of statute or which are against sound morals or derisory or of the kind which the praetors have disapproved are treated as if they were not there, and the inheritance or legacy is taken just as if the condition had not been attached to the inheritance or legacy.

15 PAPINIAN, *Questions, book 16:* A son who was in parental power, appointed heir under a condition which the senate or the emperor disapproves, may upset his father's will, as if the condition were one not in his power [to fulfill]; for any acts which offend our sense of duty, our reputation, or our sense of shame, and, if I might speak generally, which are done against sound morals, it is not to be accepted that we are even able to do.

16 MARCIAN, *Institutes, book 4:* "If Titius shall be heir, let Seius be heir; if Seius shall be heir, let Titius be heir." Julian writes that the institution is ineffective, as the condition cannot operate.

17 FLORENTINUS, *Institutes, book 10:* If several institutions have been made in respect of the same share under different conditions, the condition which has been fulfilled first will govern the institution.

18 MARCIAN, *Institutes, book 7:* When a slave was made free unconditionally and appointed heir under a condition and, if he did not become heir, received a legacy, the deified Pius laid down in a rescript that the condition was to be regarded as having been repeated in the legacy. 1. On this reasoning, Papinian also writes that when a grandmother instituted her grandson heir in respect of a share under the condition that he be emancipated and afterward in framing a codicil left him in addition a legacy exceeding that to which she instituted him as heir, the condition of emancipation is to be regarded as repeated in the legacy also, although she had made no substitution in the legacy as [she had done] in the inheritance.

19 MARCIAN, *Institutes, book 8:* If a will has been drawn as follows, "let Titius be heir; if Titius is heir, let Maevius be heir"; if Titius has accepted the inheritance of doubtful solvency, Maevius can accept at his own discretion and retain a quarter.

20 LABEO, *Posthumous Works, Epitomized by Javolenus, book 2:* A wife who owed her husband money promised in respect of her dowry had instituted her husband as heir on this condition, that he neither sued for nor exacted the money which she had promised as dowry. I think that if the husband has notified the other heirs that he was not responsible for failure to discharge the debt owing to him in respect of the dowry, he will immediately become heir. But if he has been instituted as sole heir under such a

condition, I think that he will nevertheless become heir immediately, because a condition with no force in it is to be treated as if it were not there. 1. If a person has been ordered to manumit a slave belonging to the inheritance and to be heir, although, if he has manumitted, the act has no effect, nevertheless, he will be heir; for it is true that he has manumitted him; but after acceptance of the inheritance, the freedom given to the slave in accordance with the testator's wishes will come into effect. 2. If a person has instituted you as heir on condition that you have instituted him as heir or have left him something by legacy, it does not matter in what degree he has been instituted heir by you or what has been left to him by legacy, provided that you prove that you did that in some degree.

21 CELSUS, *Digest, book 16:* A slave belonging to someone else can be instituted heir like this, "when he is free"; but one's own cannot be so instituted,

22 GAIUS, *Provincial Edict, book 18:* because reason urges that a person who can give him freedom ought to give him his freedom himself, either at the present time or at a future date, or under a condition, and that he ought not to have the opportunity of instituting him heir in the eventuality that freedom may come to him from someone.

23 MARCELLUS, *Digest, book 12:* "Let whichever of my brothers has married our cousin be heir in respect of three quarters and the one who has not married [her] be heir in respect of one quarter." She either marries one or does not wish to marry. The one of them who married the cousin will have three quarters, the quarter will belong to the other. If neither has married her, not because they themselves did not wish to marry [her], but because she did not wish to marry [either of them], both are admitted [to the inheritance] in equal shares; for generally this condition, "if he has married," "if he has given," "if he has done," ought to be taken as meaning that it was not his fault that he did not marry, give, or do.

24 PAPINIAN, *Replies, book 6:* "Let whichever of my brothers has married cousin Titia be heir in respect of two thirds; let whichever has not married [her] be heir in respect of one third." The cousin having died in the lifetime of the testator, both, coming in to the inheritance, will have a half share, because it is true that they were instituted heirs, distinguished in respect of their profit in sharing the estate by what happened in relation to the marriage.

25 MODESTINUS, *Rules, book 9:* A slave instituted heir under a condition cannot meet the condition without the authorization of his master.

26 POMPONIUS, *Quintus Mucius, book 2:* If a *pupillus* has been instituted heir under a condition, he can meet the condition even without the *auctoritas* of his tutor. And the same applies even if a legacy has been left to him under a condition, because once the condition has been fulfilled, it is as if the inheritance or legacy were left to him unconditionally.

27 MODESTINUS, *Replies, book 8:* A certain man appointed an heir in his will under a condition, such as, "if he throws my remains into the sea"; the question was asked, when the instituted heir had not met the condition, whether he should be expelled from the inheritance. Modestinus replied: The heir is to be praised rather than accused for not throwing the testator's remains into the sea according to his wishes but delivering them for burial, as a reminder of the condition of men. But this point must first be investigated, whether a man who imposed such a condition was even not of sound mind. Therefore, if this suspicion can be removed by convincing arguments, the *legitimus heres* has no way of raising a dispute about the inheritance with the appointed heir. 1. [A person] who instituted an heir unconditionally in his will attached a condition to the heir[s institution] in a codicil; I ask whether he is under the necessity of meeting it. Modestinus replied: An inheritance cannot even be adeemed in a codicil; in turn he is understood as having thought of ademption of the inheritance on failure to meet the condition.

28 PAPINIAN, *Questions, book 13:* If a son will be heir under a condition and grandsons through him are substituted to him, as it is not enough that a son is instituted heir

under any condition, but the will is only confirmed if the condition was one which it was in the son's power [to fulfill], let us consider whether it matters what condition was imposed, whether it was one which could not be fulfilled if the son died, for example, "if my son has gone to Alexandria, let him be heir," and he has died in Rome, or whether it was rather one which could be fulfilled even at the last moment of his life, for example, "if my son has given ten to Titius, let my son be heir," a condition which can be fulfilled through someone else [acting] in the name of the son. For the former species of condition does admit the grandsons to the inheritance in the lifetime of the son, who, if he had no one as substitute, on his death would be *legitimus heres* to his father, and there is an argument for this in what is recounted in Servius also; for he recounts a case of a certain man instituted heir if he climbed the Capitol, but if he had not climbed [it], a legacy was given to him, and he died before he made the climb; and in relation to this case, Servius advised that the condition had failed because of the death and that therefore on his death the legacy had vested. But the other species of condition does not admit to the inheritance in the lifetime of the son the grandsons who, if they had not been substituted, would become heirs on the death of the grandfather intestate; for the son would not be regarded as having stood in their way; for after his death the will of his father is left without an heir, just as if, after the same son had been disinherited, the grandsons had been instituted heirs when the son died.

8

THE RIGHT TO TAKE TIME FOR CONSIDERATION

1 ULPIAN, *Edict, book 60:* If a slave has been instituted heir, we have certainly not provided [the slave] himself with time for consideration, but the person who owns the slave, because, before the praetor, those people [slaves] are regarded as nonexistent. And, again, if a slave belongs to several persons, we will certainly provide it for all the owners. 1. The praetor says: "If he [the heir] asks time for consideration, I will give [it]." 2. When he [the praetor] says, "time," and does not add a [specific] date, he undoubtedly shows that it lies in the power of the person having jurisdiction [to decide] what date to arrange.

2 PAUL, *Edict, book 57:* Therefore, fewer than a hundred days should not be given.

3 ULPIAN, *Edict, book 60:* And this also should be known, that sometimes the time limit for consideration is set once and sometimes more often in that it is urged on the praetor that the time which he had arranged when first approached was not sufficient.

4 ULPIAN, *Edict, book 61:* But this request should not succeed, unless for a weighty reason.

5 ULPIAN, *Edict, book 70:* Aristo writes that the praetor should assist not only the creditors but also the instituted heir and should give the latter the opportunity of inspecting the documents so that they can thereby advise themselves whether or not it is expedient to accept the inheritance. 1. If the inheritance is of some size and the heir is considering [whether to accept] and there are objects in the inheritance which are deteriorating with the passage of time, by approaching the praetor the person who is considering can, without prejudice, [obtain authority to] sell them at fair prices; and he can sell even those which are too expensive [to maintain], for example, beasts of burden or slaves kept for sale, again, those which deteriorate by delay, and he will further need to see to it that debt which is owed under a penalty or secured by valuable pledges is paid.

6 GAIUS, *Provincial Edict, book 23:* Therefore, if, in fact, there is in the inheritance wine, oil, corn, cash, expenses should be met from that; if not, money should be claimed from the debtors to the inheritance. But if there are no debtors or they appeal to a judge, superfluous goods ought to be sold.

7 ULPIAN, *Edict, book 60:* The praetor says: "If time for considering whether it is

expedient to retain the inheritance is claimed in the name of a *pupillus* or *pupilla*, and this has been given; if there shall appear to be just cause, I shall forbid that the property should meanwhile be diminished, unless if it is done after a *cognitio* on the case in accordance with the judgment of a fair-minded man." 1. The praetor justifiably prevents interim diminution, so long as time for consideration is sought in the name of a *pupillus*. 2. However, let us consider what "I shall forbid that [the property] should be diminished" covers. By these words, the praetor not only prevents alienation but also does not allow actions to be brought; for it is absurd that a person who is forbidden to alienate should be allowed to bring actions, and Labeo writes in this sense. 3. However, in the *cognitio* on the case the question at issue is this, whether there is just cause for the praetor to allow diminution. Therefore, he will also allow diminution in respect of the funeral, and again, in respect of those matters which cannot be left undone without making atonement. He will equally allow diminution for the sake of providing food. But also, where it is a matter of urgency, he ought to allow [it] for other reasons also, so that buildings are repaired, so that fields are not left uncultivated, so that if any money is owed under penalty, it is paid back in order that pledges be not sold. The praetor on application will permit diminution for other just causes also; for no diminution ought to be made without his permission.

8 ULPIAN, *Edict, book 61:* If a person who is *suus heres*, after having refrained from [dealing with the inheritance], then asks for time for consideration, let us see whether he ought to succeed with his request; and the preferable view is that he ought to succeed in his request on cause shown, when the property has not yet been sold.

9 PAUL, *Edict, book 58:* While a son is considering, he ought to have maintenance from the inheritance.

10 MARCELLUS, *Digest, book 28:* If there are several degrees of instituted heirs, the praetor says that he will observe what he has laid down in his edict on the prescription of the time for consideration through the individual degrees, that is to say, so that, if the inheritance has been transferred from any of the first to the following one, he finds as soon as possible a successor, who can answer to the creditors of the deceased.

11 JAVOLENUS, *From the Posthumous Works of Labeo, book 4:* A man who had a son who was a freedman had instituted him as heir and then had written: "If there be no son of mine who reaches full age, then let the slave Dama be free"; there was no son, but that *pupillus* freedman; the question was asked, whether Dama was free. Trebatius holds that he is not, because a freedman would also be included in the expression "son"; Labeo takes the opposite view because, in that context, a true son ought to be understood. I approve the view of Trebatius, if it nevertheless appears that the testator was speaking of this son.

BOOK TWENTY-NINE

1

THE SOLDIER'S WILL

1 ULPIAN, *Edict, book 45:* The deified Julius Caesar was in fact the first to concede unrestricted *testamenti factio* to soldiers; but that concession was temporary. However, later the deified Titus first gave [it]; after this Domitian; thereafter, the deified Nerva conferred the fullest indulgence on soldiers; and Trajan followed this, and thenceforth such a chapter came to be inserted in [imperial] mandates. A chapter from the mandates: "As it has been submitted to my notice that wills left by our fellow soldiers, which could be open to dispute if regard were had to the diligent observance of the laws, are repeatedly submitted; following the openness of my heart toward those excellent and most faithful fellow soldiers, I thought that provision should be made for their inexperience [in legal matters], so that whatever the way in which they made their wills, their wishes should be confirmed. Therefore, let them make their wills in any way they wish, let them make them in any way they can, and let the bare wishes of the testator suffice to settle the distribution of their property." 1. However, a soldier is so called either from the soldiering, that is, the hardship, which they bear on our account or from their multitude or from the evil which soldiers normally keep away or from the number of a thousand men, derived from a Greek word, drawn from *tagmas*; for the Greeks call a multitude of a thousand men ταγμα as if each thousandth man were mentioned; and hence they call the leader himself χιλίαρχον (leader of a thousand). However, the army (*exercitus*) has drawn its name from exercising.

2 GAIUS, *Provincial Edict, book 15:* The proconsul issues an edict about the soldier's will separately for this reason, that he knows very well from imperial *constitutiones* that special and peculiar legal provisions are observed in relation to their [soldiers'] wills.

3 ULPIAN, *Sabinus, book 2:* If a soldier who had intended to make a will according to the general law has died before he made the will? Pomponius is doubtful. But why does he not approve a different rule in the case of a soldier? For a man who intended to make a will according to the general law has not immediately renounced his privilege as a soldier, nor is it to be accepted that anyone chooses his method of making a will for the purpose of impugning his dispositions but rather that he intended to make his will in both ways, to take account of possible accidents; in the same way as the majority of civilians when they make a written version of their will normally wish to add that this is also to stand as a codicil. Whatever he has said, if the will is incomplete, is not a codicil; for the deified Marcus also has given a rescript in accordance with our view.

4 ULPIAN, *Sabinus, book 1:* It is settled that by military law a deaf and dumb person can make a will if he is still with the colors before dismissal as unfit for service.

5 ULPIAN, *Sabinus, book 4:* Soldiers can make a substitution even to those who have become their heirs, [but] only in respect of what they have acquired through their will.

6 ULPIAN, *Sabinus, book 5:* If a soldier has appointed someone heir in respect of a farm it is accepted that he died intestate with respect to the remainder of his estate; for a soldier can die partly testate and partly intestate.

7 ULPIAN, *Sabinus, book 9:* Even if a person who is making his will by military law did not know that his wife was pregnant, or she was not pregnant, and he nevertheless was of this mind, that he wished whoever might be born to him to be disinherited, [his] will is not broken.

8 MARCELLUS, *Digest, book 10:* The same applies even if he has adopted a son by *adrogatio* or a grandson has come in place of a son.

9 ULPIAN, *Sabinus, book 9:* And the same view must be taken even if, after the birth of a son to him in his lifetime, he has preferred to die leaving the same will unchanged; for he is regarded as having made his will again under military law; 1. as was decided by the deified Pius in a rescript, in the case of a person who made a will when he was a civilian and then entered military service; for this also becomes valid by military law, if the soldier preferred this.

10 ULPIAN, *Sabinus, book 11:* A person taken prisoner by the enemy cannot make a will even by military law.

11 ULPIAN, *Edict, book 45:* Those sentenced to capital punishment for a military crime are permitted to make a will only in respect of their property acquired on military service; but the question arises whether [they may do so] by military law or the general law. However, the preferable view is that they should make their will by military law; for as the right of making a will is conferred upon him as a soldier, it will follow that it should be held that he ought to make his will by military law, which must be understood as applying where the bond of his oath has not been broken. 1. If a soldier has made a will [when] uncertain whether he is independent, the status of his will is that it is valid; for even if he has made a will [when] uncertain whether his father is alive, his testament will be valid. 2. If a son-in-power, not knowing that his father has died, has made a will of his *peculium castrense* while on service, his father's property will not belong to his heir, but only his property acquired on military service.

12 PAPINIAN, *Replies, book 6:* For soldiers leave by their writings only those things which they had.

13 ULPIAN, *Edict, book 45:* It is the same even if he thought of changing his will, not because he wished to take the property acquired on military service away from the appointed heir, but because he wished to make a will of his paternal property and appoint another person heir. 1. But if he has died when already a veteran, Marcellus, in the tenth book of his *Digest*, writes that all his property, [including] even his paternal [property] will belong to the heir [appointed in respect of] his property acquired on military service; for he was no longer able to make a will in respect of part of his property. 2. And deported persons and almost all those who do not have *testamenti factio* can be instituted as heir by a soldier. But if he appoints a *servus poenae* heir, the institution will not be valid; but if at the time of the death he is found to be a citizen, the institution becomes validated, as if the inheritance were given at this time. And, generally speaking, this could be said of all those whom a soldier appoints heir, [namely] that the institution acquires validity if at the time of the death the person instituted is found to be someone who could be instituted by a soldier. 3. If a soldier has instituted his own slave, whom he thought to be free, as heir, without [a grant of] freedom, the situation is that the institution is not valid. 4. When a soldier gave freedom to his slave in his will and left him the inheritance through a *fideicommissum* charged on the first and second heirs, although both the first heir and the substitute died before they accepted the inheritance, our emperor, along with the deified Severus, stated by rescript that [the soldier] ought not to make his end intestate; but the case is to be treated as if freedom and the inheritance, both of which the testator undeniably intended him to obtain, had been given simultaneously and directly to that same slave.

14 MAECIANUS, *Fideicommissa, book 4:* It was discussed whether any such indulgence should be given in the wills of civilians also; and it is settled that this cannot be done without making a distinction, but if in fact they died in the lifetime and to the

knowledge of the testator, no new provision should be laid down, but if [this happened] without his knowledge or after his death, a remedy should certainly be found.

15 ULPIAN, *Edict, book 45:* Obviously, even a soldier cannot create more than one *necessarius heres* to the prejudice of his creditors. 1. However, just as a soldier can grant his inheritance by a bare expression of his wishes, so he can take it away. Hence, if he has canceled his will or cut it open, it will have no effect, but if he has canceled his will and then wished it to be valid, it will be valid, following his last wish. And, therefore, when a soldier had struck out his testament and then sealed it with his ring, the person who is to hold a *cognitio* on the matter will consider with what purpose he did so; for if it is proved that he had second thoughts about his change of mind, the testament will be regarded as renewed; but if it was so that what had been written could not be read, the case that his disposition was made void will be regarded as stronger. 2. The deified Pius stated in a rescript that a will made by a soldier before entering military service is valid by military law if he has died on service, if this is not against the soldier's wishes. 3. If a person has written his own name as heir in a soldier's will, the penalty imposed on him by *senatus consultum* is not remitted. 4. A soldier can make someone heir up to a particular time and someone else heir thereafter, or from or to the fulfillment of a condition. 5. Again he can make a testament by military law both for himself and for his son; and for his son alone, although he has not made one for himself; and this testament will be valid, if it happens that the father has died on military service or within a year of completing his service. 6. Papinian writes in the fourteenth book of his *Questions* that even for a soldier, *bonorum possessio* cannot be granted beyond the time determined in the edict, because that determination is general.

16 PAUL, *Edict, book 43:* If a soldier has left a legacy of dotal land, the legacy will not be effective because of the *lex Julia.*

17 GAIUS, *Provincial Edict, book 15:* If a soldier has instituted heirs in respect of certain things, for example, one in respect of his urban lands, another in respect of his lands in the country, and another in respect of the rest of his property, the institution will be valid, and the case will be treated exactly as if he had instituted them heirs without specifying their shares and had distributed all his property by leaving it to each by *praelegatum.* 1. Julian even says that where someone had appointed one person in respect of his property acquired on military service and another in respect of the rest of his property, these were to be understood as being two inheritances belonging to the two men, so that even in respect of debt which had been contracted on military service, only the man who had been instituted heir in respect of the property acquired on military service is liable, and only the man who had been appointed heir in respect of the rest of the property is bound by debt contracted outside military service. And it certainly seems in accordance with this that advice was given that according to the basis on which debts are owed to the soldier, they are owed by force of law to the latter heir or the former. But if either share of the property is not sufficient to meet the debts outstanding on the appropriate basis, and on this account, the person who was instituted heir in respect of that share has not accepted, the other, who had accepted, is to be compelled either to defend actions in respect of the whole inheritance or pay the whole to the creditors. 2. If, in the same will, a soldier has appointed the same person heir and then disinherited him, the inheritance is regarded as taken away, while in the will of civilians an inheritance cannot be taken away by a mere disherison. 3. If a father, who has been instituted heir in respect of his *peculium castrense* by his son-in-power who is a soldier, takes possession of anything from the *peculium* without relying on the will, or has acted fraudulently so that he no longer possesses it, an action in respect of the legacies [left in the will] is given against him. 4. If a soldier has made a will while on military service and a codicil after service, and dies within a year of his discharge, it is settled by most authorities that in respect of the codicil the civil law rule should be observed because it has not been made by a soldier, and it is not relevant that it has been confirmed by the will. And, therefore, in respect of those legacies which have been given in the will there is no place for the *lex Falcidia,* but in respect of those which have been set out in the codicil, it does apply.

18 TRYPHONINUS, *Disputations, book 18:* But if, when put together, the two classes of legacies, both those which have been given in the will and those which have been given in the codicil, come to more than three quarters of the estate, the question arises to what

extent those to which the *lex Falcidia* applies are reduced. However, the most convenient rule is that after payment in full, out of the soldier's whole property, of the legacies which he had given in his will, what is left over is divided in the proportions of three quarters and one quarter between the heirs and those to whom legacies were given in the codicil. 1. What happens, therefore, if the legacies which were given in the will use up the amount of the whole property; will those to whom a legacy has been left in the codicil take nothing or something? And since, if the soldier had also left these by legacy as well, they would all be put together and from all there would come off proportionately, the share of what he had left by legacy which exceeded what he had in his estate, the same thing will also happen now; and then, having settled the amount of the legacies which have been given in the codicil from the sum total of what would be due if all were due on an equal basis, he will deduct a quarter only from those to whom legacies were given in the codicil. 2. But if, after computing the whole amount of both legacies, it should be found that something remains with the heir, but nevertheless not enough to make up a quarter of those same legacies, the amount by which he is short is taken away only from those to whom legacies were given by codicil.

19 ULPIAN, *Disputations, book 4:* The question was asked what the law was where a soldier, who had already made a will, had made another one, and in that had included a provision that he imposed a *fideicommissum* on the heir that the former will should be given effect. I said a soldier is allowed to make several wills, but whether he made them at the same time or separately they will certainly be valid if he made express provision in this sense, nor will the earlier will be broken by the later one, since he can institute an heir for part of his estate, that is, die partly testate and partly intestate. More than that, indeed, even if he had first made a codicil, he can give it the force of an institution by providing so through the subsequent will and make direct what was a precatory institution. In accordance with this, in the instant case I stated the view that if the soldier was of a mind that the will first made should take effect, what he provided ought to take effect, and thus it would come about that there are two wills. But in the instant case, as a *fideicommissum* is imposed on the heir to give effect to the earlier will, it is apparent that he did not intend that it should take effect by operation of law but rather by *fideicommissum*, that is, that he had converted the operation of the prior will to the status of a *fideicommissum* and a codicil. 1. But the question arises whether the whole will has been converted to that status, that is, including the institution of the heir, or rather only the legacies, the *fideicommissa*, and the grants of freedom. But it appears to me that not only the other provisions apart from the institution of the heir but also the institution of the heir itself has been converted to the status of a *fideicommissum*, unless it is proved that the testator had written otherwise. 2. Where one person had been appointed heir by a soldier up to a certain time and another person from that time the question arises whether the later heir is bound to pay legacies charged on the earlier heir. And I think that he is not bound, unless it is proved that the wishes of the soldier were otherwise.

20 JULIAN, *Digest, book 27:* If a military tribune, remaining in camp, has made a codicil within a certain number of days after his relief had arrived in the camp and has died there, since he ceases to be regarded as performing the functions of a soldier after his relief has arrived in camp, the codicil is to be judged according to the general law applying to Roman citizens. 1. When someone, having made a will, has begun military service, that will also which he made before he began military service in some circumstances is regarded as having been made in the course of military service, for example, if he has cut open the will and read it and again sealed it with his seal, and, further, if he has even erased something here and there, struck through something, added to or emended it; but if nothing affecting the property has happened, his testament will not enjoy the privileges of soldiers.

21 AFRICANUS, *Questions, book 4:* With regard to the provision made by *constitutio* that a will made during military service should remain valid for the year after discharge

also he [Julian] thought that so far as the words are concerned, that benefit applied only to those who normally are given a discharge; and in accordance with this, neither prefects nor tribunes nor the others who, when their reliefs have arrived, cease to perform military service will have this privilege.

22 MARCIAN, *Institutes, book 4:* If a soldier, who is a son-in-power, has undergone a change of civil status having been emancipated or given in adoption by his father, his will is valid as if based on a new expression of his wishes.

23 TERTULLIAN, *Peculium Castrense, sole book:* The same applies also if a head of a household who is a soldier, having made a will in respect of his property acquired on military service only, has given himself in *adrogatio*; but if he did this when he had already been discharged, the will is not valid.

24 FLORENTINUS, *Institutes, book 10:* The deified Trajan issued the following rescript to Statilius Severus: "That privilege which has been given to those on military service, that wills made by them in any fashion are valid, ought to be understood in this way, that, above all, it ought first to be established that a will has been made, which can be done even without writing and that even by those not on military service. If, therefore, the soldier about whose property there is a question raised before you, having called together men for the purpose of evidencing his wishes, spoke in such a fashion that he made clear whom he wished to be his heir and to whom he wished to grant liberty, he can be regarded as having made his will in this way without writing, and his wishes are to be regarded as confirmed. But if, as frequently tends to happen in the course of talk, he said to someone, "I make you heir" or "I leave you my property," this ought not to be treated as a will. Nor is it of greater importance to any one than those to whom that privilege has been given that this kind of example should not be admitted; otherwise, without difficulty, witnesses would be found for some soldier after his death who would assert that they had heard someone saying that he was leaving his property to anyone that seemed good to them and by this means actual dispositions are subverted."

25 MARCELLUS, *Replies, sole book:* Titius, before he had been made tribune of a legion, made a will and, having afterward received his commission, he died while still a tribune; I ask whether his will is regarded as being a military will. Marcellus replied: The will which he had made before his tribunate falls under the general law, unless it should be proved that it was said that something was afterward done by him, to show that he wished it to take effect; for it is not the wills of soldiers, but those which have been made by soldiers, which are confirmed by imperial *constitutiones*; but obviously, a person who has declared in any way that he wishes a will which he had previously made to take effect is to be construed as having made a will.

26 MACER, *Military Matters, book 2:* The wills of those who have been discharged with ignominy immediately cease to be valid by military law, which grants a year's grace to the wills of those who have earned an honorable discharge or a discharge on the grounds of unfitness for service. The right of making a will in respect of their *peculium castrense*, which is conceded to sons-in-power who are on military service, does not apply to those who have been discharged with ignominy, because it has been granted as a reward to those who deserve it.

27 PAPINIAN, *Replies, book 6:* A centurion instituted *postumi* as heirs in a second will and did not appoint substitutes; and he said in his will that if they were not born he reverted to the previous will. It was settled that the rest of what he wrote in his second will was void unless he had confirmed it specifically on reverting to his former wishes.

28 ULPIAN, *Sabinus, book 36:* When a son-in-power who was a soldier had died after instituting an *impubes* son as heir and he had substituted to him a son remaining in his grandfather's parental power and appointed tutors, the deified brothers stated in a rescript that the substitution was certainly valid but the appointment of a tutor was not valid, because a soldier can of course make any substitution that he wishes in re-

spect of his own inheritance, but he cannot diminish the rights of someone else.

29 MARCELLUS, *Digest, book 10:* If an heir appointed by a soldier has accepted the inheritance of his own free will and, having been asked to do so [by *fideicommissum*], has handed over the whole inheritance the actions pass under the [*senatus consultum*] *Trebellianum.* 1. A soldier by manumitting [a slave] in his will does nothing for one whose freedom is prevented by the *lex Aelia Sentia* or any other such. 2. The Edict of the praetor by which he remits an oath to instituted heirs and legatees applies even to the wills of soldiers, as it applies even to *fideicommissa*, and likewise, if the condition was disgraceful. 3. It is settled that *bonorum possessio contra tabulas* in respect of the share due to him should be given to a person's father, who in an emancipation had himself become manumitter, with the exception of that property which he [the son] had acquired on military service in respect of which he has unfettered *testamenti factio.*

30 PAUL, *Questions, book 7:* For the deified Pius Antoninus stated in a rescript that *bonorum possessio contra tabulas* should not be given in respect of the testament of a son-in-power who is a soldier, so far as property acquired or military service is concerned.

31 MARCELLUS, *Digest, book 13:* If a soldier left a slave as a legacy to Titius and Seius and Titius had manumitted him while Seius was considering whether to accept and then Seius had not taken up the legacy, I hold that he will have to be freed, because even if, where a slave was left by legacy to someone, the heir had meantime manumitted him and then the legatee had refused, he would be free.

32 MODESTINUS, *Rules, book 9:* If the inheritance of a soldier is not accepted in accordance with his probable wishes, his property acquired on military service does not belong to the heirs either.

33 TERTULLIAN, *Peculium Castrense, sole book:* If a son-in-power who was a soldier had made a will in military fashion and then, after his father's death, a *postumus* was born to him, his will is certainly broken. But if he had remained of the wish that that will should remain in force, it will take effect, as if it had been made again, provided that he was still on military service at the time when the *postumus* was born to him. 1. But if a son-in-power who was a soldier had made a will, and then afterward, while he was alive and his grandfather also still survived, a *postumus* was born to him, his will is not broken because, as what was born to him did not come within his parental power, a *suus heres* is not regarded as added by agnation; and, indeed, as this *postumus* grandson was born during the lifetime of the son, he is not even regarded as being added immediately by agnation as a *suus heres* to the grandfather, and, therefore, the will of the grandfather is not broken either, because although he immediately entered the parental power of the grandfather, the son nevertheless preceded him. 2. And in accordance with this, if a son-in-power who is a soldier has made a will and has not mentioned a *postumus*, in error and not because he wanted him to be disinherited, and then a *postumus* has been born after the death of the grandfather while the son, that is, his father, is still alive, he will in every case break the latter's will. But if, in fact, he is born when the latter has already become a civilian, the will which was broken will not be validated; but if the *postumus* has been born while the father is still on military service, it will be broken and then, if the father wished it to be confirmed, it will be validated in this way as if made afresh. 3. But also if the *postumus* is born in the lifetime of his grandfather, he will not break his father's will immediately; if he has survived after the death of his grandfather, while his father is still alive, he will break it, because a new heir is now for the first time added to the latter by agnation, but in such a way that he can never simultaneously break the wills of the two, both his grandfather and his father.

34 PAPINIAN, *Questions, book 14:* The deified Hadrian stated in a rescript that the will of a soldier who has preferred to die, because he can no longer stand his pain or is weary of life, is valid, or if he has died intestate, his property is claimed by those who are called to the succession by statute. 1. A man discharged from military service began to make a will within a year [of his discharge] and was not able to complete it; it can be held that a will which he made while on service is thereby canceled if it was

made in accordance with military law; otherwise, if it was valid by the general law, it has not been lawfully rescinded. 2. And yet the same distinction will not be applied in the case of a soldier; for in whatever way he made his will it will be rescinded in accordance with his last wishes, because the wishes of a soldier are also a will.

35 PAPINIAN, *Questions, book 19:* If a soldier leaves an incomplete will, the writing which is presented has the same force as a complete will; for a soldier's will is completed by the mere expression of his wishes; and a man who writes several things over various days is often regarded as making his will.

36 PAPINIAN, *Replies, book 6:* Where a soldier has made a codicil to a will, even a grant of the inheritance is regarded as lawfully made. And, therefore, if he has given a half share of the inheritance by codicil, the heir appointed in the will to the whole inheritance will have a half share, but the legacies given in the will are due by them jointly. 1. A soldier, after instituting different heirs in respect of his property acquired on military service and his property which was not so acquired, afterward instituted other heirs in respect of his property acquired on military service. He is regarded as having taken away from his earlier will only as much as he transferred into his later one; and it is not regarded as changing the situation even if a single heir had been appointed in the earlier will. 2. A soldier, not knowing when making his last arrangements that his wife was pregnant, made no mention of children to be born. When a daughter was born after her father's death, it became evident that the will was broken and that the legacies were not due either. But if, in the meantime, the appointed heir had paid any legacies, they ought to be revoked by granting *utiles actiones* to the daughter on account of the unforeseen happening, and the instituted heir, as he was a possessor in good faith, should not be accountable for anything that she was not able to recover. 3. A veteran when dying wanted a will which he had made in accordance with the general law during the time of his service to be nullified and preferred to be intestate. It was settled that the institutions of heirs and substitutions had remained in the same situation, but that those suing for legacies were met by the defense of fraud in accordance with the general law; for the strength of this defense is assessed having regard to the person suing; otherwise, when other things are equal, the case of the possessor is stronger. 4. A soldier, having made a will under the general law, and having afterward made a will under military law disposing of all his property, died after a year from the end of his military service; it was settled that the validity of his earlier will, which it was agreed was broken, was not restored.

37 PAUL, *Questions, book 7:* If of two heirs appointed by a soldier who was a freedman one has not accepted the inheritance, the deceased will be regarded as having died partly intestate, because a soldier can be partly testate, and *bonorum possessio* on intestacy is also competent to his patron, unless it has been proved that it was the deceased's wish that if one [of the heirs] did not accept the inheritance, he intended the whole inheritance to revert to the other.

38 PAUL, *Questions, book 8:* The statement that if a soldier has died within a year of his discharge, a will which he had made in accordance with military law is valid is true even if a condition on the institution has been fulfilled after the year has expired, where he died within the year. And, therefore, if he has provided a substitute for his son as heir, it does not matter when the son dies; for it is sufficient that his father died within the year. 1. A soldier had made a will and then, having been discharged, but not ignominiously, he again joined the colors in another branch of military service; the question was asked whether his will, which he had made while on service, was effective. I asked whether he made his will in accordance with military law or the general law. And if he, indeed, made it in accordance with the general law, there is no doubt that it is effective. But if he had made the will as a soldier, I began to consider when he had been taken on again after he had ceased to be in service, whether within a year or after a year; I learned that he had been taken on again within a year. Therefore, if, when it was still effective by military law, he was again able to make a will under the same law, is the will not effective even after a year, if he has died? I was moved by the consideration that there is other service later; but it is more humane to hold that the will is effective, looking at the periods of duty on military service as combined. I do not speak of a man who wished his will to be effective even after he was taken on

again; for he has made his will, as it were during his subsequent service, on the analogy of the man who made one as a civilian and then entered on military service.

39 PAUL, *Questions, book 9:* If a son-in-power who is a soldier, having been captured, has died in captivity, we shall hold that the *lex Cornelia* applies to his will also. But let us ask whether, if his father has died before him in the *civitas* leaving a grandson through the son, the father's will is similarly broken. And it must be held that the will is not broken because he is regarded as having died as at the time when he was captured.

40 PAUL, *Replies, book 11:* Lucius Titius, a soldier, dictated his will to his secretary to be written up from shorthand notes and died before it was written out in full form; I ask whether this dictation can be effective [as a will]. I replied that soldiers have been conceded a right to make a will in any way they might wish and in any way they can, always provided that it is shown by lawful evidence that this is really what took place. 1. The same [Paul] replied that where a will had been made in accordance with military law, a slave, who was owed a legacy, albeit under a condition, could claim freedom also for himself. 2. The same [Paul] gave the following advisory opinion: Lucius Titius, a soldier, made a will as follows: "Let Pamphila, my slave-girl, be my heir in respect of the whole inheritance"; and then in another section, he left the same Pamphila to Sempronius his comrade in arms and imposed a *fideicommissum* on him to manumit her; I ask whether Pamphila was heir and if she had received her freedom directly. I replied that the soldier who had instituted his slave-girl as heir was to be understood as not having known that freedom also could be available to her under that institution and, therefore, that he had had no reason afterward to ask his comrade in arms to manumit her; as she was made free and heir under the earlier writing, the later legacy of her was ineffective, as not involving any derogation from his wishes.

41 TRYPHONINUS, *Disputations, book 18:* A soldier can appoint an heir as follows: "Let Titius be heir so long as he lives and Septicius after his death." But if he has made the appointment as follows, "let Titius be heir for a period of ten years," providing no substitute, the situation after ten years will be intestacy. And because we have said that soldiers can institute an heir from a certain time and until a certain time, the consequence of this is that before the time comes when the instituted heir is admitted, the inheritance is offered on intestacy and what he is permitted to do in respect of a share of his estate is competent also under the same privilege in respect of a period of time, although this is a not inconsiderable one. 1. A woman on whom a suspicion of disgrace may fall cannot take anything, even under the will of a soldier, as the deified Hadrian stated in a rescript. 2. And a soldier cannot appoint a tutor to a person who is in the parental power of someone else. 3. If a soldier has disinherited a son or, knowing that he is his son, has passed him over in silence, the question has been asked whether he can give a legacy charged on the substitute to him. I held that he cannot, although he has left ample legacies to the disinherited son. 4. A soldier can make a substitution even to an emancipated son; but this right will be exercisable in respect of such property as the person to whom he made the substitution acquired from him, and not also in respect of such as he had or afterward acquired. For even if he has made a substitution to his son while his grandfather is still alive, no one would say that the inheritance of the grandfather which he later acquired belongs to the substitute. 5. If a soldier's inheritance has not been accepted, the question arises whether a substitution which he made to a *pupillus* is valid. And it will be logical to hold so, because it is permissible for a soldier to make a will for his son, although he has not made one for himself.

42 ULPIAN, *Edict, book 45:* A man begins to be able to make a will in accordance with military law from the time when he has been enrolled with the colors and not before; consequently, those who are not yet with the colors, although they are even selected recruits and are traveling at public expense, are not yet soldiers; for they ought to be enrolled with the colors.

43 PAPINIAN, *Replies, book 6:* A son-in-power, equipped for cavalry service and retained in the imperial retinue, having been ordered to take up arms immediately, can make a will of his *peculium castrense.*

44 ULPIAN, *Edict, book 45:* Imperial rescripts show that every one of those persons who

are of such a rank that they cannot make a will in accordance with military law can make a will in any way they wish and in any way they can if they are seized in enemy territory and die there, whether he is governor of a province or anyone else who cannot make a will in accordance with military law.

2

TAKING UP OR FAILING TO TAKE UP AN INHERITANCE

1 PAUL, *Sabinus, book 2:* A person who can take up a whole inheritance cannot, by splitting it up, accept it only in part.

2 ULPIAN, *Sabinus, book 4:* But even if someone has been instituted in respect of several shares in the inheritance of the same person, he cannot reject certain shares and accept certain shares.

3 ULPIAN, *Sabinus, book 6:* So long as an earlier instituted heir is able to accept the inheritance, a substitute cannot do so.

4 ULPIAN, *Sabinus, book 3:* A person who cannot accept an inheritance is not regarded as being unwilling to do so.

5 ULPIAN, *Sabinus, book 1:* It is agreed that a dumb person and also a deaf person, even those born in that condition, can act as heir and become bound to the inheritance. 1. It is agreed that a person who is interdicted from managing his property by statute, if instituted heir, can accept the inheritance.

6 ULPIAN, *Sabinus, book 6:* A person who is in someone else's parental power cannot bind the person in whose power he is to an inheritance against his will, so that the father is not saddled with debt. 1. But in the case of *bonorum possessio*, it has been settled that a claim made by a person subject to parental power without consulting the wishes [of the head of the household] can be ratified. 2. But also if the inheritance of his mother has been offered to a son as *legitimus heres* in terms of the *senatus consultum Orfitianum*, the same rule must be approved. 3. But even if the son has not accepted and his father has nevertheless been in possession of the inheritance for a long time, he is to be regarded as having acknowledged the inheritance, as the deified Pius and our emperor have stated by rescript. 4. If a man, who thought that he was a son-in-power, has accepted on his father's instructions, it is agreed that he has acquired the inheritance neither for himself nor for the person who gave the instructions; although where a man who has been ordered to accept by his father, who then died, accepts, he binds himself to the inheritance if he accepts when his father is already dead, as Julian has said in the thirty-first book of his *Digest*; for he prefers to allow that a man who is in doubt as to whether he has become a son-in-power or head of a household on the death of his father can accept an inheritance. 5. Sometimes sons-in-power will acquire an inheritance for those in whose parental power they are, even without acceptance, as, say, where a grandson through a disinherited son has been instituted heir; for he will make his father heir without acceptance and, indeed, *necessarius heres*. 6. But if someone who has been instituted heir is adopted by a disinherited son, he does not make him *necessarius* [*heres*], but ought to be instructed to accept because he was not in parental power at the time of the death; for someone cannot become *necessarius* through someone who himself would not have been so. 7. Celsus has written in the fifteenth book of his *Digest* that it is settled that a man who, driven by the fear of words or some terror, mistakenly has accepted an inheritance, if he be free, does not become heir, if he be a slave, does not make his master heir.

7 PAUL, *Sabinus, book 1:* If a person has instituted a son-in-power as heir and has written as follows, "if Titius, the son-in-power, shall not be heir let Sempronius be heir," if the son accepts on the instructions of his father, the substitute is excluded. 1. If a son, before he knew that he had become *necessarius heres* to his father, has died leaving a son as a *necessarius*, the grandson is to be permitted to abstain from his grandfather's inheritance, because the same concession would be made to his father also. 2. In all cases of succession a person who has become heir to a person who was

heir to Titius is regarded as being heir to Titius also and he cannot refuse to take up the inheritance of Titius.

8 ULPIAN, *Sabinus, book 7:* By the custom of our state, neither a *pupillus* nor a *pupilla* can come under an obligation without the *auctoritas* of their tutor, but that an inheritance saddles us with debt, especially if it is not solvent, is more than obvious. However, we are talking of an inheritance to which persons of this kind do not succeed as *necessarii* [*heredes*] 1. An *impubes* who is in another person's parental power acquires an inheritance for him if he has accepted the inheritance on his instructions, although he was not capable of forming his own judgment.

9 PAUL, *Sabinus, book 2:* If a *pupillus* is able to speak, albeit he is of an age that he does not understand what it means to acquire an inheritance and although a boy of this sort of age is not regarded as knowing (for [a person of] such an age cannot know or make a decision, any more than a lunatic), he, nevertheless, can acquire an inheritance with his tutor's *auctoritas*; for this is afforded to them as a favor.

10 ULPIAN, *Sabinus, book 7:* If an heir in respect of the whole inheritance has decided to have a share of the inheritance, he is regarded as having acted as heir in respect of the whole.

11 POMPONIUS, *Sabinus, book 3:* The power of abstaining [from an inheritance] is given to children who are *impubes* in every case, but to children who are *pubes*, only if they have not intermeddled with it.

12 ULPIAN, *Edict, book 11:* It is not necessary for a person who has not intermeddled with his father's inheritance, whether he be of full age or under full age, to apply to the praetor, but it is sufficient that he has not intermeddled with the inheritance. And there is a rescript to Soter and Victorinus Vibius, recorded in the six-monthly report, to the effect that it is not necessary for *pupilli* to obtain *restitutio in integrum* in respect of a contract of their grandfather where their father had decided not to take up the inheritance and had not removed anything or acted as heir.

13 ULPIAN, *Sabinus, book 7:* A person who has been instituted heir or to whom an inheritance has been offered as *legitimus heres* loses the inheritance by repudiation of it. This is true insofar as the inheritance was in such a position that it could be accepted; but if an heir instituted under a condition has repudiated before the condition is realized, he has done nothing, whatever the condition was, even if it was left to his discretion. 1. If a person is doubtful whether the testator is alive or not, by repudiating he does nothing. 2. Similarly, also if a substitute repudiates before the instituted heir decides about the inheritance, the repudiation will be of no effect. 3. Neither a son-in-power by repudiating without his father nor a father without his son prejudices the other; however, both can repudiate.

14 PAUL, *Sabinus, book 2:* The same applies even if an inheritance comes to sons as *legitimi heredes*.

15 ULPIAN, *Sabinus, book 7:* A person who thinks that he is *necessarius* [*heres*] when he is voluntary [heir] will not be able to repudiate; for what is thought has more weight than the truth.

16 ULPIAN, *Edict, book 24:* And conversely a person who thinks that he is *necessarius heres* cannot be a voluntary [heir].

17 ULPIAN, *Sabinus, book 7:* Nor can someone repudiate who thinks that a will is not valid or is forged. But if it is certain that what is said to be forged is not forged, just as he acquires the inheritance by accepting it, so he loses it by repudiating it. 1. An instituted heir who is at the same time *legitimus heres*, if he has repudiated as instituted heir, does not lose the inheritance as *legitimus*; but if he has repudiated as *legitimus*, if, in fact, he knows that he was instituted heir, he is to be regarded as having repudiated both; if he does not know, the repudiation will not prejudice him with regard to either, not with regard to the inheritance by will, because he did not repudiate it, and not with regard to the inheritance as *legitimus*, because it had not yet been offered to him.

18 PAUL, *Sabinus, book 2:* That person can repudiate [an inheritance] who can also acquire [it].

19 PAUL, *Edict, book 59:* A person who wishes to accept an inheritance or claim *bonorum possessio* ought to be certain that the testator is dead.

20 ULPIAN, *Edict, book 61:* A person is regarded as acting as heir when he does some act as if he were heir. And Julian writes, as a general proposition, that only a person who carries out some action as if he were heir acts as heir; but acting as heir is not so much a matter of action as of the mind; for he ought to have in mind that he wishes to be heir. But if he has done something as a matter of piety, if he has done something as a matter of protection, if he has acted not as heir, but as owner under some other title, it is clear that he is not regarded as having acted as heir. 1. And, therefore, children who are *necessarii* [*heredes*] normally declare that the actions they take are not taken with the intention of being heir, but either as a matter of piety or as a matter of protection or on their own account. Say, for instance, [a son] has buried his father or performed his obsequies; if he did so with the intention of being heir, he has acted as heir; certainly, if he has done this as a matter of piety, he is not regarded as having acted as heir. He has fed slaves belonging to the inheritance, he has either fed beasts of burden or sold them; if he did this as heir, he has acted as heir; or if not as heir, but in order to safeguard them or he thought them his own or, while he is considering [whether to take up the inheritance], he did something with an eye to preserving things in the inheritance in case he should not decide to act as heir, it is clear that he is not regarded as having acted as heir. Consequently, also if he has leased farms or houses or shored them up or has done anything else not with the intention of acting as heir, but looking to the interests of the person who has been substituted or will be heir on intestacy or has sold property which would perish through time, the situation is such that he has not acted as heir, because he had not that intention. 2. If, nevertheless, he claims anything as heir but one of those things which do not pass to an *extraneus heres*, let us consider whether he has enmeshed himself in the burdens of the inheritance, as, say, where he claims workdays from a freedman of his parent; these an *extraneus heres* could not claim, but he, by claiming them, can obtain them. And it is agreed that he has not acted as heir, as the claim for them is competent also to creditors and especially that for the future ones. 3. But someone who has buried the deceased in a hereditary sepulcher also is not to be regarded as coming under an obligation to his father's creditors, as Papinian says; and this view is more humane, although Julian has written to the opposite effect. 4. Papinian writes that certain people commonly think that a son, instituted heir, who has abstained from intermeddling with his father's property can be sued by creditors if he has accepted money from a *statuliber*, whether the cash was from the *peculium* or not, because what is given for the purpose of fulfilling a condition is accepted in accordance with the wishes of the deceased. Julian, however, thought the same even if he has not abstained. But Papinian says that he has acted as heir only if he is the sole heir; but if he has a co-heir and the co-heir has accepted, a person who has accepted [money] from a *statuliber* is not, he says, to be compelled to defend actions by the creditors; for when the son abstains, he ought to obtain by praetorian law what an emancipated son who has repudiated the inheritance obtains; and, if this is done, the *statuliber*, having been instructed to give money to the son specifically, could have attained his freedom by giving it to him, not as heir. Therefore, he says, he is to be regarded as acting as heir whenever he accepts what he could not accept if he did not hold the name and legal position of heir. 5. If a son should sue in respect of violation of a sepulcher, although it is a hereditary one, because he takes nothing from the property of his father, he is not regarded as intermeddling with the property; for this action is concerned with a penalty and punishment rather than recovery of property.

21 ULPIAN, *Sabinus, book 7:* If a person who is an *extraneus heres* is holding something from the inheritance as thief or robber, he is not acting as heir; for his crime evidences a contrary intention. 1. But sometimes his mere intention will bind him to the inheritance, as, say, where he has used something not belonging to the inheritance as if heir. 2. But he will only acquire the inheritance by acting as heir if it is already open for his acceptance; but it is to be noted that the same circumstances as we have said render the acts of someone repudiating [an inheritance] void, render void what is done by someone acting as heir. 3. If a person did not know to what share he was instituted,

Julian writes that this does not prevent him from having acted as heir. And Cassius also approves this, if he is not unaware of the condition under which he was instituted heir, provided that the condition under which he was substituted has come about. But what if he does not know that the condition had come about? I think that he can accept the inheritance, just as he can if he does not know whether the share of his co-heir to whom he has been substituted has been offered to him through the latter's repudiation.

22 PAUL, *Sabinus, book 2:* If a person to whom an inheritance belongs as *legitimus heres* thought that the deceased was his slave and acquired it as being his *peculium*, it is settled that he is not bound to the inheritance. We shall, therefore, as Pomponius says, hold the same view, if he has taken possession of his property in the belief that he was his freedman when he was freeborn. For in order that a person may bind himself to an inheritance by acting as heir, he must know on what basis the inheritance belongs to him; for example, the nearest agnate, appointed heir under a lawful will, before the will is revealed, when he thought that the head of the household died intestate, although he has done everything as owner, nevertheless will not be heir. And the law will be the same if an heir, appointed under a will which was not lawful, although he administered everything as owner after the will was produced, when he thought that it was lawful, he will still not acquire the inheritance.

23 POMPONIUS, *Sabinus, book 3:* In the matter of repudiation of an inheritance or a legacy, the person who repudiates ought to be certain of his legal position.

24 ULPIAN, *Sabinus, book 7:* It was a matter of discussion whether a person who takes a price for not accepting an inheritance is regarded as acting as heir; and the view obtained that one who has accepted it so that he shall not be heir does not indeed act as heir, but he falls within the provisions of the praetor's edict. Therefore, whether the nonheir has accepted [money] from a substitute or from the *legitimus heres*, he is regarded as having accepted *mortis causa*. And it will be the same even if he has not accepted money, but it has been promised to him; for by stipulation also he takes *mortis causa*.

25 ULPIAN, *Sabinus, book 8:* If someone, the slave of another person, is in good faith acting as my slave, he will achieve nothing by accepting an inheritance on my instructions, and he will not acquire for me, nor indeed will a slave in whom I have a usufruct. 1. A slave belonging to the citizens of a municipality or a *collegium* or a *decuria*, who has been instituted heir, if manumitted or alienated, will [be able to] accept the inheritance. 2. If he is a slave of the imperial treasury, he will [be able to] accept the inheritance on the instructions of the imperial procurator, as has often been stated in rescripts. 3. If, of course, a person instituted heir has become a *servus poenae*, because condemned to be executed or to fight with beasts or to work in the mines, this will be treated as if the institution had not been made; and the deified Pius stated this by rescript. 4. Instructions by someone who has another in power are not like the *auctoritas* of a tutor, which is interposed at completion of the business, but ought to come first, as Gaius Cassius writes in the second book of his *Civil Law*; and he thinks that they may be given either by a messenger or by letter. 5. But can they be given generally, "whatever inheritance may have been offered to you," or specially? And, as Gaius Cassius writes, the prevailing view is that a special mandate ought to be given. 6. The question arises whether a specific mandate can be given with respect to the inheritance of someone who is still alive, but I do not think that the possibility of giving a mandate in respect of the inheritance of a living person should be accepted. Certainly, if there was a rumor that Lucius Titius had died, he will be able to give him a mandate to accept if he has appointed him [heir], or if the will has not yet been opened and it is uncertain whether the son has been appointed heir. 7. But what if he gave a mandate to collect the inheritance, is he regarded as having given a mandate to accept it? What if [the mandate was] to claim *bonorum possessio*? Or to sell something from the inheritance? Or what if he ratified *bonorum possessio* claimed and then his son accepts the inheritance? Or what if he gave a mandate to act as heir and his son accepted the inheritance? It can be doubted whether he is regarded as having accepted on instructions. But, in fact, the better view is that with respect to all of these, acceptance is to be inferred. 8. A father wrote to his son as follows: "I

know, my son, that you will look after the inheritance of Lucius Titius, which has been offered to you in accordance with your usual prudence." I think that he has accepted on the instructions of his father. 9. What if he gave this mandate: "If it is expedient to accept, accept?" "If you think it expedient to accept, accept?" The acceptance will be on instructions. 10. If he gave instructions to accept "in the presence of Titius" or "at the discretion of Lucius Titius," I think that he gave proper instructions. 11. But if he gave his mandate on the assumption that he was instituted to the whole estate and he is found to be instituted to a share, I do not think that the acceptance was on instructions. But if he gave instructions in respect of a share, he can accept for the whole estate. It is different if he gave the mandate on the assumption of an intestacy and he accepted under a will; for I do not think that his action had any effect. But if he gave a mandate in respect of a will, he will be able [to accept] on intestacy also, because he has not made his father's situation worse. And it is the same also if he gave his orders on the assumption that [the son] was instituted and he is found to be substituted, or vice versa. 12. But if he gave a mandate to accept the inheritance of a father, but he was also substituted to an *impubes*, the instructions are not sufficient. 13. Certainly, if he gave his mandate in these terms, "if any inheritance is offered under the will of Lucius Titius," the view can be defended that he accepted under instructions. 14. But if, after he gave the instructions, he had second thoughts before [his son] accepted, the latter achieves nothing by accepting. 15. Again, if he gave himself in *adrogatio* before his son accepted, the inheritance has not been acquired.

26 PAUL, *Sabinus, book 2:* Where my slave or son and I have been instituted heir, if I have instructed my son or slave to accept, Pomponius writes that I am at once heir under my own institution also; and Marcellus approves the same view and Julian.

27 POMPONIUS, *Sabinus, book 3:* Labeo says that no one can act as heir in the lifetime of the person in respect of whose property action is required.

28 ULPIAN, *Sabinus, book 8:* Aristo thinks that the praetor, if applied to, should give to the heir the opportunity of claiming the accounts of the deceased from the person in whose custody they are, when he is considering whether to accept the inheritance.

29 POMPONIUS, *Sabinus, book 3:* A person who, when instituted heir, is prohibited by someone who has been instituted along with him and has already accepted the inheritance from inspecting the will, the documents, or the accounts of the deceased from which he might discover whether he ought to accept the inheritance is not regarded as acting as heir.

30 ULPIAN, *Sabinus, book 8:* When a man who was away on a mission had been unable to instruct his son, who had been instituted heir and was in a province, to accept the inheritance, the deified Pius stated in a rescript that the consuls ought to assist him on his son's death because he had been absent on state business. 1. The statement, "the heir next after a *postumus* son cannot accept the inheritance while the widow is pregnant or is thought to be so; but if he knows that she is not pregnant, he can do so," understand as meaning, "the next after an unborn child who will be born as *suus heres*." And the statement relates not only to those who are testate but also to the intestate. And you should understand it as applying equally to an unborn child who will be born as *legitimus heres* or blood relative, because a child unborn at the time of the death, so far as delaying the claims of those who come after him or anyone who must give place to him if he is born is concerned, is treated as already born. And in the same way and by edictal *bonorum possessio*, moreover, the praetor gives the unborn child *missio in possessionem*. 2. Whether, therefore, I think that the widow who is to bear the child who is to be *suus heres* is pregnant, or she is in fact pregnant, I cannot accept the inheritance because there is the possibility that he may break the will, unless you suppose the case of an unborn child who has been instituted heir or disinherited. 3. The statement "if she is thought to be pregnant" is to be understood in the sense that she says that she is pregnant. What, then, if she herself does not say so, but says that she is not, while others say that she is pregnant? Still the inheritance cannot be accepted; suppose midwives say so. What if he alone thinks so? If he has just reason, he cannot accept; if in accordance with the opinion of many, he can. 4. What, then, if she was pregnant when the heir thought that she was not pregnant, he accepted, and then she had an abortion? Undoubtedly, his action was ineffective. Therefore, his assumption is to his advantage whenever it is in accordance with the truth. 5. But even if

the widow herself has been instituted heir and she is pretending that she is pregnant, she will acquire the inheritance by accepting it; on the other hand, she will not acquire it if she thinks that she is pregnant when she is not. 6. It is certain that the *suus heres* is heir to the whole estate even if he thinks that the widow is pregnant and she is not. What if she has one child in the womb, is he heir in respect of a half share, if you suppose either the *postumus* to have been instituted or the father to have died intestate? And Tertullian relates in the fourth book of his *Questions* that Sextus Pomponius also was of this opinion; for he thought that just as a *suus heres* is heir to the whole estate along with an empty womb, so also when she is carrying one child and cannot in the nature of the human constitution form another one (which will certainly be the case from a certain period after conception) he will be heir in respect of a half share, even if he does not know, and not in respect of a quarter, as Julian thinks. 7. Where, however, it is a matter of knowledge or opinion, if a son-in-power or a slave has been instituted, is it theirs or that of their master or father which is to be taken into account? Suppose the father to have thought that she was pregnant and the son to be certain that she is pretending and so accept; does he acquire the inheritance? I think that he acquires, but if it is the other way round, he does not acquire. 8. If I am certain that a will is not forged or null or broken, although it is said to be so, I can accept the inheritance.

31 PAUL, *Sabinus, book 2:* Where an heir has been instituted along with a *postumus*, the remaining shares, which were given to the *postumus*, accrue to the heir if it is certain that the mother is not pregnant, even if the heir does not know.

32 ULPIAN, *Sabinus, book 8:* The instituted heir cannot accept the inheritance if he thinks that the testator is alive, although he is already dead. 1. But also if he knows that he has been instituted heir but does not know whether it is unconditionally or conditionally, he will not be able to accept the inheritance, even if he has been instituted heir unconditionally and, if instituted conditionally, even if he has fulfilled the condition. 2. But also if he is uncertain of the testator's status, as head of a household or a son-in-power, he will not be able to accept the inheritance, even if his status in truth is such that he could make a will.

33 PAUL, *Plautius, book 12:* But if he is doubtful whether he died in captivity or as a Roman citizen, because in both cases there is a right to accept and the position is such that he can accept, it must be held that he can accept.

34 ULPIAN, *Sabinus, book 8:* But it has already been said that even if a person is doubtful of his status, namely, whether he is a son-in-power, he can acquire the inheritance. But why can he accept where he does not know his own status if he cannot where he does not know that of the testator? The reason for this is that the person who does not know the status of the testator is in doubt whether the will is valid, the one who does not know his own is certain about the will. 1. But even if, when he was instituted unconditionally, he thought that it was conditionally, and he accepted, after fulfillment of the condition which he thought was inserted, can he acquire the inheritance? It is logical to hold that he can accept, especially as this belief did not harm him at all and involved no risk. It will be easier for anyone to allow this, if a person instituted unconditionally thought that he was instituted conditionally and that the condition which he thought was in issue was fulfilled; for this belief did not harm him at all.

35 ULPIAN, *Sabinus, book 9:* If a person instituted heir for a share and then substituted to Titius has acted as heir before the inheritance is offered to him under the substitution, he will be heir under the substitution also, because the share accrues to him even if he does not want it. I hold the same view also if a son-in-power or a slave has accepted the inheritance on the instructions of his master or father, and then, after emancipation or manumission, they accept [the inheritance] under the substitutions; for they will be heirs; for those are supplements to the preceding institution. 1. If a father, excluded by a condition imposed on him, instructed his son to accept, it will have to be held that he did not acquire his own share. 2. But if he instructed one of two sons [to accept], he will have to instruct the other son to do so also.

36 POMPONIUS, *Sabinus, book 3:* If a master or father has accepted in respect of his own share, authorization must be given so that a son or slave co-heir may accept.

37 POMPONIUS, *Sabinus, book 5:* An heir succeeds to the whole legal position of the deceased and not only to the ownership of individual things, because the assets which take the form of debts due also pass to the heir.

38 ULPIAN, *Edict, book 43:* If two people are *necessarii heredes* and one of them has abstained while the other, after the former abstained, intermeddled [with the estate], it must be held that the latter cannot refuse to undertake the whole burdens of the inheritance; for as one who knows, or could have known, that through the abstention of the former, he would involve himself in the burdens, he is regarded as accepting on that condition.

39 ULPIAN, *Edict, book 46:* So long as an inheritance can be accepted under a will, it is not offered on intestacy.

40 ULPIAN, *Disputations, book 4:* The question has been raised whether, although a person does not touch anything in his father's inheritance, nevertheless, he holds or does something because of his father's wishes, he is compelled to answer to his father's creditors, as, say, where he has been substituted to an *impubes*. And in relation to this case Julian wrote in the twenty-sixth book of his *Digest* that he would come within the edict if he intermeddled with the inheritance of the *impubes*; for a person who has gone against the dispositions of his parent should not obtain anything from the same inheritance. But Marcellus makes an elegant distinction, saying that it matters a great deal whether he was instituted in his father's will to the whole estate or to a share, in respect that if it were to be a share, he could fearlessly take up the inheritance of the *impubes*, having rejected his father's succession.

41 JULIAN, *Digest, book 26:* If a son who has abstained from his father's inheritance has intermeddled with the inheritance of his disinherited brother and acted as heir, he will be able to obtain the inheritance under a substitution.

42 ULPIAN, *Disputations, book 4:* Julian wrote in the twenty-sixth book of his *Digest* that if a *pupillus* had abstained from his father's inheritance and then someone had become heir to him, that person would not be compellable to answer to the father's creditors, unless he were substituted to him; for he inclines to think that the substitute would be subject to the father's obligations also. And this view has rightly been censured by Marcellus; for it works against the interests of the *pupillus*, who himself, at least, can have a successor; for anyone will be more timid about accepting the inheritance of the *impubes* also if he fears the prospect of having to meet the father's debts. Otherwise, he says, even if he was a brother, he will take possession of the inheritance on intestacy, rejecting his claim under the will, and that without penalty; for a person who looks to his own interests, to avoid having the inheritance of the *pupillus* involved in the father's debts, is not regarded as having intended to commit a fraud on the edict. But what he wrote of a brother I think is to be understood as relating not to the brother of the *impubes*, but to the brother of the testator; but certainly, if a brother is substituted to his *impubes* brother by their father, he will undoubtedly be *necessarius heres*. 1. If, after his father's death, a son has remained in a partnership which he had entered into in his father's lifetime, Julian rightly makes a distinction on the basis that it matters whether he is completing some business begun under his father or has begun some new business; for he wrote that if he has begun something new in the partnership, he is not regarded as having intermeddled with his father's inheritance. 2. If a son has manumitted a slave of his father, he will undoubtedly be regarded as having intermeddled with his father's inheritance. 3. The case was put of a son who had bought slaves from his father out of his *peculium castrense* and was asked by his father to manumit them when he had been instituted heir by him; the question was asked whether he is regarded as having intermeddled with his father's inheritance if he had abstained from his father's inheritance and had manumitted them. We held that unless he clearly manumitted as heir, he ought not to suffer the charge of having intermeddled with the inheritance.

43 JULIAN, *Digest, book 30:* An heir cannot acquire through a slave belonging to an inheritance a share of the same inheritance or anything belonging to the same inheritance.

44 JULIAN, *Digest, book 47:* Whenever a *pupillus* becomes heir to his father and abstains from the inheritance, although the father's property comes under the control of the creditors, whatever the *pupillus* did in good faith should nevertheless be ratified; and, therefore, assistance will have to be given to someone who bought from the *pupillus* with his tutor's *auctoritas*; and it does not matter whether the *pupillus* is solvent or not.

45 JULIAN, *Urseius Ferox, book 1:* Acceptance of an inheritance is not part of the work of a slave. 1. Therefore, if a slave forming part of a dowry has accepted an inheritance, the wife will recover it in the action on the dowry, although anything which is acquired from the

work of dotal slaves belongs to the husband. 2. And when a partnership of gains and savings is entered into, whatever a partner has acquired from his work he will contribute to the common stock; but each acquires an inheritance for himself. 3. Moreover, not even a slave held in usufruct will be able to accept an inheritance on the instructions of the person who has a usufruct in him. 4. And the advice given by certain authorities in their consultations, that if a freeman who was serving me in good faith as a slave has been instituted heir on my account, he can accept the inheritance on my instructions, can be right, if he is understood as acquiring for me, not in respect of his services, but in respect of my affairs, in the same way as he acquires for me in respect of my affairs in stipulating and acquiring by delivery.

46 AFRICANUS, *Questions, book 1:* When a will was said to be forged and the heir himself was accused, because he ought to be certain that he did not commit the forgery, he will be justified in accepting the inheritance; but if someone else were claimed to have done so without his knowledge, he cannot accept, inasmuch as he is in doubt whether the will is a true one.

47 AFRICANUS, *Questions, book 4:* A person who had instructed his slave, who had been instituted heir to accept [the inheritance], became a lunatic before he accepted. He [Julian] denied that the slave would be justified in accepting, because the inheritance cannot be acquired except by the wish of the master, but the wishes of a lunatic are of no effect.

48 PAUL, *Handbook, book 1:* If a person has given someone a mandate to apply for *bonorum possessio* for him if he has thought it worthwhile, and, after the latter applies for it he becomes a lunatic, *bonorum possession* nevertheless has been acquired for him. But if, before he applies for it, the person who gave the mandate to make the application becomes a lunatic, it must be held that *bonorum possessio* was not acquired for him immediately; therefore, the application for *bonorum possessio* must be confirmed by ratification.

49 AFRICANUS, *Questions, book 4:* He [Julian] says that a *pupillus* becomes bound by accepting an inheritance with the *auctoritas* even of a tutor who is not playing an active part in the tutelage.

50 MODESTINUS, *Advice on Drafting, sole book:* If a tutor has given instructions by letter to a slave of the *pupillus* to accept an inheritance and the tutor dies after signing the letter, before the slave accepted in terms of the letter, no one is going to hold that the *pupillus* is afterward bound to take up the inheritance.

51 AFRICANUS, *Questions, book 4:* It is settled that a person who is appointed heir in two wills of the same testator, when he is in doubt whether the later one is forged, can accept the inheritance under neither. 1. A son-in-power, appointed heir, had informed his father that the inheritance appeared to him to be solvent; the father had written back that it was reported to him to be of questionable value and that he ought therefore to make more diligent investigation and only accept if he had found out that it was worthwhile; the son, after receiving his father's letter, accepted the inheritance; it was doubted whether he had rightly accepted. The more probable view would be that so long as he was not persuaded that the inheritance was solvent he had not bound his father. 2. But even if someone said this, "if the inheritance is solvent, I accept the inheritance," the acceptance is null.

52 MARCIAN, *Institutes, book 4:* When a son-in-power had been instituted heir and had a father who was a lunatic and in whose power he was, the deified Pius stated in a rescript that he was interposing his benevolent authority to the effect of treating acceptance by the son-in-power as if it had been acceptance by the head of the household, and he permitted him also to manumit slaves in the inheritance. 1. A person who has been instituted heir unconditionally to one share and conditionally to another as sole heir, if he has accepted the inheritance, will be heir to the whole estate even while the condition is unfulfilled, because whtever happens he is going to be sole heir, unless he has a substitute with regard to the conditional share.

53 GAIUS, *Lex Julia et Papia, book 14:* Where a person was instituted heir to two shares, in respect of one unconditionally and in respect of the other conditionally, and he accepted [the inheritance] under the unconditional institution and died and afterward the condition was fulfilled, that share also will belong to his heir. 1. A person who once becomes heir in respect of any share succeeds to the shares of those who do not take, even if he does not want to do so, that is, the shares of those who do not take tacitly accrue to him even if he does not want them.

54 FLORENTINUS, *Institutes, book 8:* Whatever the time at which an heir accepts an inheritance, he is understood to have succeeded to the deceased as from the time of death.

55 MARCIAN, *Rules, book 2:* When a *necessarius heres* abstains from his father's inheritance, the option opens to his co-heir, whether *suus* or *extraneus*, to claim the whole or withdraw completely, and so he can abstain on account of someone else when he could not do so in his own right. If, nevertheless, the creditors say that they are satisfied with his share, because he cannot be discharged unless the option opens, the creditors ought to abstain from the other's share also, so that his actions are given to the person who is sued.

56 ULPIAN, *Edict, book 57:* If the one who intermeddled with the estate had died and then the other abstains, the same option must open to his heir as to himself, as Marcellus says.

57 GAIUS, *Provincial Edict, book 23:* The proconsul gives *necessarii heredes*, and not only those who are *impubes* but also those who are *pubes*, the power to abstain from the inheritance, so that although they are liable at civil law to the creditors of the inheritance, an action is not given against them if they wish to abandon the inheritance. But to *impuberes*, indeed, he even offers the opportunity of abstaining although they have intermeddled with the inheritance, but to *puberes* only if they have not intermeddled. 1. But, nevertheless, where *puberes* are under twenty-five years old, he also comes to their assistance under the general edict relating to those under twenty-five years old if they have rashly claimed their parent's insolvent inheritance because even if they have accepted an insolvent inheritance from a stranger, he gives them *restitutio in integrum* under that section of the Edict. 2. But this is not allowed in the case of slaves who are *necessarii heredes*, whether they are *puberes* or *impuberes*.

58 PAUL, *Rules, book 2:* A slave instituted heir to a share becomes free and a *necessarius heres* even if the inheritance has not yet been accepted by his co-heir, because he receives his freedom, not from his co-heir, but from his own self, unless he was instituted thus, "when someone becomes my heir, let Stichus be free and heir."

59 NERATIUS, *Parchments, book 2:* A person who has become heir to a father, if he is also substitute to his son who is *impubes*, cannot pass over the latter's inheritance; and this result must be accepted even if he should die in the lifetime of the *pupillus* and then the *pupillus* dies *impubes*. For the person who has become heir [to the father] will necessarily also be heir to the *pupillus*; for if it binds him against his will, it must be held that this inheritance is joined with the father's inheritance and by right of accrual is acquired to anyone who is heir of the father.

60 JAVOLENUS, *From the Posthumous Works of Labeo, book 1:* A father instituted his emancipated son sole heir and, if he did not become heir, had ordered a slave to be free and heir; the son, on the basis that his father had been insane, applied for *bonorum possessio* on intestacy, and thus came into possession of the inheritance. Labeo says that if it were proved that the father had made his will when of sound mind, the son is heir to his father under the will. I think that this is wrong; for when an emancipated son does not want an inheritance given to him by will to belong to him, it immediately passes to the substitute heir, and a person who, in order not to take up the inheritance, claims *bonorum possessio* under another section of the Edict cannot be regarded as having acted as heir. PAUL: Proculus too disapproves of Labeo's view and takes the view of Javolenus.

61 MACER, *Duties of Provincial Governor, book 1:* Where a *minor* was granted *restitutio in integrum* after he became heir to a share, the deified Severus decided that his co-heir is not compellable to take up the burden of his share, but *bonorum possessio* should be given to the creditors.

62 JAVOLENUS, *From the Posthumous Works of Labeo, book 1:* Antistius Labeo says that a person instituted thus, "if he has sworn an oath, let him be heir," although he has sworn, nevertheless, will not be heir immediately, before he has done some action as heir, because by swearing he is regarded, rather, as having [merely] stated his intention. I think that he has sufficiently acted as heir if he swore as heir; Proculus [thinks] the same, and this is the law applied. 1. Where a slave instituted heir had been alienated after receiving instructions from his master [to accept] but before he accepted, new instructions from the later owner, and not the instructions of the earlier one, are required.

63 POMPONIUS, *Rules, sole book:* MARCELLUS notes: A lunatic cannot acquire for himself the benefit of an inheritance under a will, unless he is *necessarius heres* to his father or master, but it can be acquired for him through someone else, for example, through a slave or someone whom he has in his [parental] power.

64 JAVOLENUS, *From the Posthumous Works of Labeo, book 2:* A slave belonging to two people, instituted heir and instructed to accept [the inheritance], if he has accepted on the instructions of one master and then been manumitted, will be able himself to become heir for a half share by accepting.

65 PAUL, *Sabinus, book 2:* And if the same slave should have a substitute in these terms, "if he does not become heir, let that person be heir," the substitute has no claim.

66 ULPIAN, *Edict, book 61:* If a slave held in common has become *necessarius heres* to one of his owners or to several or to all, he will not be able to abstain from the inheritances of any of them.

67 ULPIAN, *Rules, book 1:* If a slave held in common has been instituted heir by a stranger and has accepted the inheritance on the instructions of one [of his masters], he, in the meantime, does not make him heir for a greater share than his share of the ownership, and then if the other joint owners do not give instructions [to accept], tacitly by operation of law [their] shares accrue to him.

68 PAUL, *Lex Julia et Papia, book 5:* When a single slave has been instituted heir, just as it is permissible for him to accept the inheritance at one time on the instructions of all his masters, so he can rightly accept at separate times on the instructions of individual masters; for because he accepts on a number of occasions, he is regarded, as a matter of expediency, as presenting himself, not under the will, but in right of his masters, so that the rights of one are not injured by the haste of another.

69 ULPIAN, *Edict, book 60:* So long as an institute can be admitted [to the inheritance], there is no room for a substitute, and he cannot succeed before the instituted heir has been excluded. The result, therefore, will be that a praetorian remedy is necessary, both in the matter of refusing actions to the first-named and prescribing a time for the substitute, because he can neither accept the inheritance nor act as heir within the time prescribed for the first-named. But a person who has been appointed in the third degree may instead come in if the second-named dies while the first-named is considering [whether to accept]. Therefore, with respect to each individual, we wait until the inheritance is first offered to him; and then again, after it has been offered, we wait for the time prescribed, and within this time, we refuse him actions, unless he either accepts or acts as heir.

70 PAUL, *Edict, book 57:* Where there are several degrees of heirs, the rule to be observed is that if a will is presented, one starts first with the heirs appointed, and then one passes on to those who have a claim to the inheritance as *legitimi heredes*, even if the same person has a claim in either way; for this has the consequence that proceeding by degrees, he first repudiates the inheritance offered under the will and then that offered to him as *legitimus*. The law is the same in the matter of *bonorum possessio* in that, first, the appointed heir rejects *bonorum possessio* and, then, the person who can apply on intestacy. 1. But if a condition has been imposed on the person who can claim the inheritance as *legitimus heres*, he cannot make any decision on the inheritance as *legitimus* before the time set by the condition passes, and so it must be held in that case also. 2. If he has replied that he does not wish to claim the inheritance on either basis, possession of the property of the deceased must be given to the creditors.

71 ULPIAN, *Edict, book 61:* If a person has redeemed a slave belonging to someone else from captivity and instituted him heir with [a grant of] freedom, I prefer to think that he will be free and *necessarius heres*; for when he grants him freedom, he releases him from

his bond and he returns with *postliminium* only in this sense, that he does not again become the slave of the person who owned him before he was captured; for this seems rather unfitting, but he should in every case offer his former master his value or remain bound to him until he pays his price; and this was introduced to favor freedom. 1. If someone has been bought on the condition that he be manumitted within a certain time and he has been instituted heir with [a grant of] freedom, let us consider whether he should be assisted by allowing him to abstain from [the inheritance]. And the preferable view is that so long as the time has not yet passed, he can become *necessarius heres* to him, and he cannot abstain; but if the time has passed, then he becomes not a *necessarius*, but a voluntary heir, and he can abstain, following the precedent of a slave to whom freedom is due conditionally under a *fideicommissum*. 2. If someone has given money to his master in order to be manumitted, I think that assistance should be given to him in every case. 3. The praetor says: "if through him or her it came about that anything was removed from that inheritance." 4. If some *suus* says that he does not wish to retain the inheritance, but he has removed anything from the inheritance, he will not have the benefit of abstaining. 5. The praetor did not say: "if he has removed anything," but "if through him or her it came about that anything was removed from it"; whether, therefore, he removed something or saw to it that it was removed the edict will apply. 6. We regard as having removed something, someone who concealed it or pilfered it or used it up. 7. The praetor says: "That anything was removed from it"; however, whether one thing or several were removed, the edict is applicable, whether they were part of that inheritance or belong to that inheritance. 8. A person who has put a thing aside with no cunning or wicked intent is not regarded as removing it; nor indeed is someone who was mistaken about the thing, thinking that it did not belong to the inheritance. If, therefore, he took the thing away, not with the intention of removing it, nor in order to cause loss to the inheritance, but thinking that it did not belong to the inheritance, it must be held that he is not regarded as having removed it. 9. These words in the edict relate to a person who has first removed something and then abstains; but if he has first abstained, and then removed, let us consider whether the edict is applicable in this case. And the preferable view and my own opinion is that, in that case, the view of Sabinus should be adopted, namely, that he is liable to the creditors rather in the action for theft; for once someone has abstained, how else is he later bound by reason of his delict?

72 PAUL, *Plautius, book 1:* If a person has been appointed heir in such a way that he is to accept the inheritance within a certain time, and if he has not accepted in this way, someone else is substituted to him, but the former heir has died before he accepted, no one doubts that the substitute does not usually have to wait until the last date for acceptance.

73 PAUL, *Plautius, book 7:* If a person wishes to have aliment from a freedman of his father, not as heir, but as a needy son of his patron, there is no doubt that this falls outside the ambit of intermeddling with his father's estate, and Labeo correctly writes in this sense.

74 PAUL, *Plautius, book 12:* If a person, who thinks that he has been ordered to give ten when he was ordered to give five, has given ten, he will become heir by acceptance. 1. But if he thinks that he was ordered to give five, when he was ordered to give ten, and he gives five, he does not fulfill the condition, but he achieves something in that if he has made up the rest, the condition is regarded as fulfilled by the giving of the other five. 2. If a person, who is acting as a slave in good faith, has accepted [an inheritance] as on the instructions of his master, he will not be bound. 3. Similar to him is a *statuliber* who, having been instructed by the heir to accept an inheritance after the condition attached to his freedom has been fulfilled, has accepted when he did not know this. 4. The case must be considered of a man, who, having been instituted heir by someone, is doubtful whether the freedom given to him under his master's will has taken effect, because he does not know whether the condition attached to his freedom has been fulfilled or whether the inheritance has been accepted; does he become heir by accepting? Julian would say that he becomes heir.

75 MARCELLUS, *Digest, book 9:* Titius was appointed heir for a half share; in error he applied for *bonorum possessio* of a quarter. I ask whether his action was null or, instead, everything has to stand just as if a quarter had not been mentioned. He replied that the act was rather null in the same way as where an heir, appointed to a half share, in error accepted the inheritance for a quarter.

76 JAVOLENUS, *Letters, book 4:* If you had been instituted heir conditionally in respect of a sixth share and when Titius to whom you had been substituted did not take up his share, you had accepted [the inheritance] under the substitution, and then the condition affecting the sixth was fulfilled, I ask whether you needed to accept, so that your sixth should not be lost. He replied: It does not matter whether I first accepted under the substitution or under the first institution, because one acceptance is sufficient in respect of both claims; therefore, the sixth which was given to me conditionally belongs to me alone. 1. Again, if you failed to give an acceptance of the sixth in respect of which you had been instituted heir, do you doubt that by accepting under the substitution, you would have the share belonging to Titius's share? He replied: I do not doubt that if I can be heir by accepting under the first institution it is in my power to decide what share of the inheritance I wish either to lose or to claim.

77 POMPONIUS, *Quintus Mucius, book 8:* There can be doubt on whether, when I had been instituted heir under a will by someone whose inheritance would have belonged to me as *legitimus heres* even if he had died intestate, I can repudiate both claims to the inheritance at the same time because, until I have repudiated the inheritance under the will, it does not yet belong to me as *legitimus heres*. But I am understood as repudiating the inheritance both under the will and as *legitimus heres* at the same moment, just as, if I wish it to belong to me as *legitimus heres* when I know that it has been left to me by will, I will be regarded as first repudiating the will and so as having acquired as *legitimus heres*.

78 POMPONIUS, *Quintus Mucius, book 35:* There had been two brothers and they had held their property in common; one of them had died intestate and had left no *suus heres*; the brother who survived did not wish to be heir to him; he sought advice on whether he had bound himself to take up the inheritance on account that he had used the common property when he knew his brother to be dead. He replied that he was not bound unless he had used it with the purpose of showing that he wished to be heir. Therefore, he ought to take care that he did not exercise his control in any matter for more than his own share.

79 ULPIAN, *Lex Julia et Papia, book 2:* It is agreed that whenever an inheritance or anything else is acquired through someone for the person in whose [parental] power someone is, it is acquired immediately for the person in whose power he is and, for a certain moment, does not stand vested in the person through whom it is acquired and so it is acquired by the person for whom it is acquired.

80 PAUL, *Lex Julia, book 5:* If I have been instituted sole heir in respect of several shares, I cannot leave one share aside, and it does not matter whether I have a substitute in some of them or not. 1. I take the same view even if I have been instituted heir in respect of several shares, mixed in with other heirs, namely, that here also by accepting one share, I acquire all, provided that they are offered for acceptance. 2. Again, if my slave has been instituted heir, in part unconditionally and in part conditionally, namely, with a co-heir, and he has accepted on my instructions and then, after his manumission, the condition attached to the other share has been fulfilled, the truer view is that that share has not been acquired for me, but follows him; for if the acquisition is to be to the person for whom the prior share was acquired, everything must remain on the same footing until the time when the condition attached to the other share comes about. 3. Indeed, I think that even if he is still in power, there must be a further acceptance if the condition has been fulfilled, and what we say about acceptance being made only once applies where the same person is concerned and not when an inheritance is to be acquired through someone else.

81 ULPIAN, *Lex Julia et Papia, book 13:* An instituted heir is regarded as having accepted on the basis of a substitution also, whenever he can acquire for himself; for if he were dead, he would not transfer the substitution to his heir.

82 TERENTIUS CLEMENS, *Lex Julia et Papia, book 16:* If the slave of a person who cannot take is instituted heir and, before he accepts the inheritance on the instructions

of his master, he has been manumitted or alienated, and nothing has been done in fraud of the law, he himself is admitted to the inheritance. But even if his master can take a share, the same must be held with regard to the share which he cannot take; for it does not matter whether the question relates to the whole of what he cannot take or to a part.

83 ULPIAN, *Lex Julia et Papia, book 18:* If a person has been tacitly requested to hand over the whole or a share in respect of which he has been instituted heir, it is apparent that nothing ought to accrue to him in that he is not regarded as having the property.

84 PAPINIAN, *Questions, book 16:* If, passing over possible unborn children, a son who has been emancipated or a stranger has been instituted heir, so long as the will can be broken, the inheritance is not offered under the will. But if the wife had no child in her womb and, while this was uncertain, a son retained in parental power died, he is regarded as having been heir; an emancipated son or stranger cannot acquire the inheritance otherwise than if he knows that she is not pregnant. Therefore, if the wife has a child in her womb, will it not be inequitable that a son who has meanwhile died should leave nothing to his heir? And, therefore, the son must be assisted by decree because, whether a brother is or is not born to him, he is going to be heir to his father. And the same reasoning leads to the conclusion that assistance should be given to an emancipated son also, who, in either case, in one or other circumstance is going to have something.

85 PAPINIAN, *Questions, book 30:* If anyone accepts an inheritance because of duress, the result is that he is given the opportunity of abstaining, because he is heir against his will.

86 PAPINIAN, *Replies, book 6:* When Pannonius Avitus was a procurator in Cilicia, he was instituted heir, but he died before he knew that he had been instituted heir. Because the heirs of Avitus had not been able to ratify the *bonorum possessio* which his procurator had applied for, they besought *restitutio in integrum* in name of the deceased, which in strict law is not competent, because Avitus had died within the time allowed for acceptance [of the inheritance]. Yet Maecianus, in his book of *Questions*, relates that the deified Pius issued a *constitutio* in the opposite sense in the case of a man who was in Rome as a legate, and in his absence had lost a son who, in the absence of his father, had not been able to claim *bonorum possessio* opening to him in respect of his mother, [namely], that *restitutio* was competent without respect to that distinction. And this should apply here also as a matter of humanity. 1. An emancipated son to whom the innocence of his father, accused of *perduellio*, is clear can acquire his inheritance if the *cognitio* has been suspended. 2. It was settled that a son had acted as heir who, dying after learning that his mother had died intestate, requested his heir in a codicil that he should manumit a slave forming part of his mother's property and erect a monument to himself and his parents on land belonging to his mother.

87 PAPINIAN, *Replies, book 10:* It has been agreed that a person intermeddles with his father's property, when he is regarded as acting as heir taking no account of the family bond. And, therefore, a son who, in ignorance, took possession of a field belonging to his father's inheritance, thinking that it belonged to his mother and treating it as part of the property of his mother, whose inheritance he took up is not regarded as having lost the intention of abstaining, which he formed in respect of his father's estate. 1. *Pupilli*, who, as it has been resolved, should be freed from the burdens of an inheritance, ought to be given back actions lost by *confusio*.

88 PAUL, *Questions, book 1:* A person who intentionally acknowledges a succession acts as heir, although he touches nothing belonging to the inheritance. And, hence, even if he has retained, as forming part of the inheritance, a house given in pledge of which any sort of possession was held in the inheritance, he is regarded as acting as heir; and it is the same even if he had possessed a thing belonging to someone else, as belonging to the inheritance.

89 SCAEVOLA, *Questions, book 13:* If a *pupillus* abstains from an inheritance, assistance must be given to verbal guarantors given by him also, if they should be sued under a contract relating to the inheritance.

90 PAUL, *Replies, book 12:* He replied that an inheritance cannot be acquired through a curator. 1. He also replied that where a grandson had accepted the inheritance of his father, who made a will of his *peculium castrense*, on the instructions of his grandfather, he had acquired for him the property of which his father can make a will, because it ceased to be *peculium castrense* through the change in the person [holding it].

91 PAUL, *Replies, book 15:* He replied that if it is proved that a person who abstained from his father's estate bought the property of his father through a person put up by him as purchaser, he ought to be able to be sued by the creditors, just as if he had intermeddled with his father's estate.

92 PAUL, *Replies, book 17:* A son-in-power married a wife; she died intestate after bearing sons; the sons accepted the inheritance on the instructions of their father, not their grandfather; I ask whether the inheritance was acquired for the grandfather. Paul replied that, on the facts as stated, no legal act had been done.

93 PAUL, *Views, book 3:* Whenever a father gives his son a mandate to accept [an inheritance], he ought to be sure whether his son is heir for a share or for the whole estate, whether under an institution or a substitution, and whether under a will or on intestacy. 1. Where a father or master is dumb, the preferable view is that if he does not lack understanding, when his son or slave has been instituted heir, he can instruct him to accept the inheritance by a nod, so that the benefit of it can lawfully be acquired to him; and this situation can easily be dealt with if he knows how to write. 2. A dumb slave, by acting as heir on the instructions of his master, binds his master to the inheritance.

94 HERMOGENIAN, *Epitome of Law, book 3:* A person who repudiates the estate of someone while he is still alive is not prevented from accepting his inheritance after his death, nor, again, from applying for *bonorum possessio*.

95 PAUL, *Views, book 4:* An inheritance can be refused not only by words but also by actions, and by any other expression of intention.

96 HERMOGENIAN, *Epitome of Law, book 3:* Where a person, falsely thinking that he was a *pupillus* when he was *pubes*, acted as heir, such an error will not prevent him from being heir.

97 PAUL, *Decrees/Imperial Judgments, book 3:* Clodius Clodianus, having made one will, had afterward instituted the same person as heir in another will which was invalidly made; the appointed heir, when he thought that the later will was valid, wished to accept the inheritance under it, but afterward this was found to be invalid. Papinian thought that he had repudiated the inheritance under the earlier one but could not accept under the later one. I held that he did not repudiate in that he thought that the later one was valid. He decided that Clodianus had died intestate.

98 SCAEVOLA, *Digest, book 26:* A woman had promised so much by way of dowry to Sempronius in the name of a granddaughter whom she had through Seia, and she produced a certain sum as interest; she died leaving her daughter Seia and others as heirs; Sempronius brought an action against them, and the individual heirs, including Seia among them, having been condemned in proportion to their shares in the inheritance, gave to Sempronius a *cautio* for the sum in which each had been condemned with the same interest as had been produced by the testatrix; thereafter the rest of the heirs, with the exception of the daughter Seia, abstained from the inheritance with the benefit of an imperial privilege, and the whole inheritance came to belong to Seia. I ask whether an *actio utilis* ought to be given against Seia, who remained sole heir and had possessed all the property as sole heir in respect of the shares of those who abstained from the inheritance in virtue of the imperial privilege as well. He replied that actions in respect of the shares of those who had abstained were normally decreed against the person who had accepted and preferred to undertake the whole burdens of the inheritance.

99 POMPONIUS, *Senatus Consulta, book 1:* Aristo, in the judgments of Fronto, relates

the following. When two daughters had become *necessariae heredes* to their father, one had abstained from her father's inheritance, and the other was prepared to claim her father's estate and undertake the whole burden. Cassius ordained that the praetor rightly promised that after holding a *cognitio* he would grant *actiones utiles* in respect of the inheritance to the one who had entered on her father's inheritance and would deny them to the one who had abstained.

3

HOW WILLS ARE OPENED, INSPECTED, AND COPIED OUT

1 GAIUS, *Provincial Edict, book 17:* The praetor promises that he will provide the means of inspecting and copying a will to everyone, whoever asks to inspect or even copy it; and it is obvious that he grants the opportunity to anyone asking for it either in his own or another's name. 1. However, the reason for this edict is obvious; for there can neither be a *transactio* without a judge nor can the truth about those controversies which might arise from a will be investigated before a judge, unless the wording of the will has been inspected and is known. 2. But if someone says that he does not recognize his seal, that is not, indeed, a reason for not opening the will, but in other respects it becomes suspect.

2 ULPIAN, *Edict, book 50:* The instrument containing a will does not belong to one man, that is, the heir, but to all those in whose favor anything has been written in it; indeed, it is rather a public instrument. 1. However, properly speaking, a "will" refers to one which has been lawfully completed; but we also improperly call "wills" those which are forged or unlawful or void or broken; and again we usually call those which are incomplete "wills." 2. However, whatever has been produced to form a will is regarded as falling within the description of a will on whatever material it was written, so long as it contains [the deceased's] last wishes; and both principal wills and *secundae tabulae* fall within the edict. 3. If there are several wills which someone wishes to have produced, the opportunity must be given to him [to inspect] all of them. 4. If there is a doubt whether the person, with respect to whom someone is applying for the inspection and copying of matter relating to his will, is alive or dead, it must be held that the praetor ought, after holding a *cognitio*, to lay down that, if it has become clear that the person is alive, he is not granting permission. 4a. "Inspection of the will" means allowing someone to inspect the writing itself and the seals and whatever else about the will he wants to look at. 5. Inspection of the will indicates also the reading of it. 6. However, the praetor does not allow the date of the will to be copied or inspected in order to prevent forgery; for even inspection can provide material for constructing a forgery. 7. But does he order the means of inspecting or copying immediately, or will he give time for production to anyone asking for it? And the preferable view is that it ought to be given according to the unfavorable or favorable disposition of localities. 8. If a person does not deny that the will is in his custody but does not allow it to be inspected and copied, he will, in all circumstances, be compelled to do so; but if he denies that the will is in his hands, it must be held that the matter be referred to the interdict which exists regarding the production of a will.

3 GAIUS, *Provincial Edict, book 17:* Nevertheless, a *vindicatio* for the will is competent to the heir himself, just as it is for the other property belonging to the inheritance and because of that he can also bring an action for production.

4 ULPIAN, *Edict, book 50:* As the will must be opened for a start, it is the duty of the praetor to compel those who sealed it to meet and acknowledge their seals

5 PAUL, *Plautius, book 8:* or deny that they did seal; for it is a matter of public expediency that the final dispositions of men take effect.

6 ULPIAN, *Edict, book 50:* But if the greater number of those who sealed has been found, it will be possible for the will to be unsealed with their co-operation and read out.

7 GAIUS, *Provincial Edict, book 7:* But if any of those who sealed is absent, the will ought to be sent to the place where he is, so that he may give his acknowledgment; for it is burdensome to call him back for the sake of giving an acknowledgment. After all, it is often a great inconvenience to be recalled from our business, and it is inequitable that doing his duty should cause anyone loss. And it is irrelevant whether one is absent or all. And if it happens that when all are absent for some reason, there is urgent reason to open the will, the proconsul ought to see to it that it is opened with the co-operation of men of best repute, and after it has been copied and examined by the same persons as those with whose co-operation it was opened, it is sealed up and then sent to the places, where those who sealed it are, for inspection of their seals.

8 ULPIAN, *Edict, book 50:* Even if there be no superscription to the effect that it should not be opened, nevertheless, if the testator has left a will for a *pupillus* separately sealed, the praetor will not allow it to be opened except after holding a *cognitio.*

9 PAUL, *Edict, book 45:* If a woman is in possession on behalf of an unborn child, the *secundae tabulae* must be opened so that it may be known to whom the curatory has been entrusted.

10 ULPIAN, *Lex Julia et Papia, book 13:* If a will has been written in two copies, the will has been opened if either has been opened up. 1. If the will has opened naturally of itself, there is no doubt that the will is regarded as opened; for we will not ask by whom it was opened. 2. If the will does not appear or has been burned, the position will be that the legatees ought to be assisted. It is the same if it has been suppressed or hidden.

11 GAIUS, *Lex Julia et Papia, book 11:* Just as a codicil is understood to be part of a will, so *secundae tabulae* are regarded as forming part of the principal will.

12 ULPIAN, *Lex Julia et Papia, book 13:* If a person has made a will and a copy of it, certainly if the copy has been opened, the will has not yet been opened; but if the autograph copy has been wholly opened up, it is opened.

4

WHERE SOMEONE, PASSING OVER A WILL, TAKES POSSESSION OF AN INHERITANCE ON INTESTACY OR IN SOME OTHER WAY

1 ULPIAN, *Edict, book 50:* The praetor defends the wishes of deceased persons and counters the cunning of those who, passing over a will, take possession of the inheritance, or a share of it, on intestacy with the object of defrauding those to whom something ought to be due under the dispositions of the deceased, if the inheritance were not possessed on intestacy, and he promises an action against them. 1. And it does not matter much whether a person could acquire the inheritance by his own self or through another; for in whatever way he could have done so, if he has not acquired the inheritance, the situation is that he comes within the scope of the praetor's Edict. 2. Moreover, a person who, when he was in a position to instruct [acceptance], refused to do so is regarded as passing over a will. 3. What happens, therefore, if, when his slave was instructed to accept the inheritance, he did not obey the instruction? But a slave is compellable to do so, and, therefore, his master, claiming on intestacy, comes within the edict. 4. But if the master was not informed by the slave and afterward

himself took possession of the inheritance on intestacy, he ought not to come within the edict, unless he is feigning ignorance. 5. If the case is put that the same person has been both instituted and substituted the question arises whether he comes within the edict if he has passed over the institution. And I do not think that he does, insofar as the testator who substituted him gave him this opportunity. 6. If a person has repudiated the inheritance, this is passing over the will. 7. Those who are in parental power are heirs immediately under the will, and it does not matter at all that they can abstain. But if they have intermeddled afterward, they are regarded as heirs under the will, unless, indeed, they have abstained from taking under the will but have applied for *bonorum possessio* on intestacy; for here they will come within the edict. 8. A person who, when instituted heir under a condition, could have met the condition but did not do so, when the condition is such that it is within the discretion of the instituted heir, and who then takes possession of the inheritance on intestacy ought to be liable under the edict, because this kind of condition ought to be regarded as no condition. 9. We do not inquire in the case of those who, passing over a will, take possession of an inheritance on intestacy whether they take possession as *legitimus heres* or not; for whatever the title on which they possess the inheritance or part of it they can be sued under the edict, provided, that is, that they are not in possession for some other reason, as where, say, a person, indeed, has passed over the inheritance but is in possession because of a *fideicommissum*, having been granted *missio in possessionem* in order to protect *fideicommissa*, or if you put the case that he came into possession in order to protect a debt owing; for he is not compelled to answer to the legatees in this latter case either. Therefore, the praetor's edict will apply whenever he is in possession either as *legitimus heres* or because he receives *bonorum possessio* on intestacy or if he, perhaps, possesses the inheritance as a robber, feigning for himself some title to possession on intestacy; for in whatever way a person is intending to profit from an inheritance, he will [have to] make good the legacies, subject, however, to receiving a *cautio* that "if the inheritance is evicted the legacies will be returned." 10. And if a person is not in possession of the inheritance, but has deprived himself of possession in bad faith, the result will be that he is liable as if he had accepted the inheritance. 11. However, a person is regarded as having deprived himself of possession in bad faith if he has fraudulently transferred possession to someone else so that the legatees and the others who have received anything in the will do not get what was left to them. 12. It was, indeed, a matter of debate whether only a person who fraudulently gives up the possession which he at some time had is regarded as having fraudulently deprived himself of possession or rather also a person who maliciously acted so that he did not enter on possession in the first place. Labeo says that it seems to him that a person who does not enter on possession is no less in the wrong than one who gives it up; and this view holds. 13. If a person has fraudulently passed over an inheritance so that it goes to the *legitimus heres*, he will be liable in a claim for the legacies.

2 ULPIAN, *Sabinus, book 7:* The deified Hadrian stated in a rescript that although a person who, for a price, has passed over an inheritance is not regarded as acting as heir, nevertheless, an action should be given against him on the precedent of the person who, passing over a will, takes possession of the inheritance on intestacy; hence, he will be liable to legatees and fideicommissaries. 1. But should one start with him and then come to the heir, or do we reverse the order? It seems to me to be the more humane view that the possessor of the inheritance be claimed against first, especially if he holds possession on a lucrative title.

3 POMPONIUS, *Sabinus, book 3:* If you have accepted money from a substitute so that you should pass over [the inheritance] and he has accepted [the inheritance], there is room for doubt whether an action should be given to the legatees. And I think that if he himself also passed over the inheritance and will possess the inheritance, because it would revert to him by statute, an action should be given against both of you, so, nevertheless, that an action is given against one or the other of you to anyone in whose favor a legacy has been left charged on both.

4 ULPIAN, *Edict, book 50:* If a person has not accepted money, but has simply passed over a will, wishing the benefit to accrue to the person who has been substituted or to the *legitimus heres*, will the edict not be applicable? Certainly, there must be displeasure over the circumvention of the deceased's wishes; and, therefore, if it has been clearly established that this was done to cause harm to the legatees, although not in consideration of money but induced by an excess of kindness, it must be held that there is room for an *actio utilis* against the person who is in possession of the inheritance. 1. And it will be rightly held that wherever there is a person who, wish-

ing the benefit to go to the person who is to come in if he repudiates, and he would not repudiate unless he wished the benefit to pass, and especially if he did so in order to upset [the testator's] dispositions, it must be held that there an action will be competent against the possessor to this effect, nevertheless, that we hold that where it was for a money consideration that he repudiated, the person who passed over [the inheritance] can be sued, but where he did so gratuitously, but still to the prejudice of those to whom something was left, the possessor ought to be sued by an *actio utilis*. 2. Although the praetor appears to be speaking of instituted heirs, nevertheless, this matter extends to reach others too, so that if there be a legatee on whom a *fideicommissum* has been charged and he has so acted that the inheritance is passed over, and did so fraudulently, he ought to be sued. 3. If a person has sold an inheritance, he is certainly regarded as possessing it and not as having fraudulently deprived himself of possession.

5 MARCELLUS, *Digest, book 12:* A patron who passed over the institution, when he had been appointed heir by his freedman in a way different from that in which he should have been instituted, is regarded as excused; for even if his slave were instituted heir to the whole estate and through some accidental circumstance could not accept the inheritance on his master's instructions, he will pass over the inheritance under the will without penalty.

6 ULPIAN, *Edict, book 50:* However, because a person who is in possession of an inheritance on intestacy can be sued if he passes over a will, the question has been asked whether he is compellable to perform the obligations if he appears to have passed the will over in accordance with the testator's wishes, as, say, where he has appointed his brother heir and made a codicil in case of intestacy and requested his brother, if the inheritance should come to him as *legitimus heres*, to give *fideicommissa* to certain persons; if therefore, passing over the will, he takes possession of the inheritance on intestacy, it must be considered whether he is compelled to answer to the legatees. And Julian, in the thirty-first book of his *Digest*, writes that he is compellable, first, to make good the legacies, next, after disposing of the legacies, if there is anything left of the three quarters, he is then compelled to make good the *fideicommissa*; but if the legacies use up the three quarters, then nothing is to be given to the fideicommissaries; for the *legitimus heres* ought to have a whole quarter. Therefore, an order is established by Julian that the legacies are paid first, then the *fideicommissa* from the balance, provided that the quarter is not touched. I think that the view of Julian is to be taken in this sense, that if he takes possession of the inheritance on intestacy, passing over the will, he is compelled in any case to pay the legacies; for he certainly did not allow him to pass over the inheritance when he imposed *fideicommissa* on him on intestacy. 1. Of course, if he specifically permitted him to do this, we shall hold that he does not fall within the edict, because he used the opportunity which the testator granted to him; but if the testator did not specially grant him [power] to pass over [the will], the order which Julian set out will have to be followed. 2. What, then, shall we say if legacies have been left under the will and *fideicommissa* on intestacy to the same persons and in addition *fideicommissa* to others? Ought we to follow the order which Julian sets out, or shall we bring all the fideicommissaries together as equals? And the preferable view is that we make the following distinction, that it makes a great difference whether the heir falls within the edict or not. For if he does, those to whom anything was left in the will are to be preferred; but if he does not, because it was the wish of the testator to give him the opportunity of succeeding on intestacy also, or because some other cause intervened, which according to what has been written above, does not contravene the edict, it must be held that the *fideicommissa* ought to put together as having been placed on an equal footing. 3. However, the praetor did not simply promise that he would give an action, but that he would do so after holding a *cognitio*; for whether he finds that the testator created this situation and himself gave permission to succeed on intestacy, or some other lawful reason for passing over [the will] has occurred, he will certainly not grant an action for the legacies against him. 4. Again, if he has found that the property belongs to someone else, he will not give an action, if, that is, no suspicion of collusion has raised the scruples of the praetor. 5. However, if a person from whom the inheritance can be taken away takes possession of something from the inheritance and has ceased to possess without fraud, the preferable view is that he can no longer be sued. 6. And so at what time shall we look in determining whether he is in possession or not? The time of joinder of issue ought to be looked at. 7. Certainly, if a person has possessed *bona vacantia* and four years have passed, indubitably he will be able to be sued under this part of the

Edict, both because he passed over the will and because he took possession on intestacy and, moreover, in such a way that he is safe under the quadriennial prescription. 8. If a patron, appointed heir in respect of the share due to him, with a co-heir given to him in respect of the other share, has passed over the institution, and, because the due share had been taken out, his co-heir also did not take up the inheritance, and then the patron takes possession of the whole inheritance on intestacy as *legitimus heres*, Celsus says in the sixteenth book of his *Digest* that the action for the legacies which would be competent against Titius should be given against him and it would suffice the patron that he has the whole of the share due to him. But this is so if the co-heir was in collusion with the patron; for otherwise the patron would not be compellable to pay the legacies; for it is not forbidden that anyone should pass over an inheritance, if it is done without fraud. 9. The preferable view to be given is that this edict also relates to *bonorum possessio contra tabulas* in the sense, namely, that if a person who, on receiving *bonorum possessio contra tabulas*, would pay legacies to children and parents has not claimed that *bonorum possessio* and takes possession of the inheritance on intestacy, he is compelled to pay those which he would pay if he received *bonorum possessio contra tabulas*. 10. If freedom has been given on the condition "if he has given ten" and the will has been passed over, the freedom will not be competent otherwise than if the condition has been fulfilled.

7 MARCELLUS, *Digest, book 12:* A certain person instituted Titius and Maevius heirs and gave a legacy of a hundred to Titius; both, passing over the will, accepted the inheritance as *legitimi heredes*. Titius cannot honorably claim an action for legacies. It is the same if he had left a legacy to both.

8 ULPIAN, *Edict, book 50:* If a person, instituted heir on the condition of giving ten or on any other condition consisting in giving or doing something, takes possession of the inheritance on intestacy, passing over the will, it must be considered whether assistance should be given to the person in whose favor the condition is conceived. And the preferable view is that he should not be helped; for he is not a legatee.

9 PAUL, *Edict, book 45:* Even if he has still time to fulfill the condition, he is not liable under this part of the Edict.

10 ULPIAN, *Edict, book 50:* If the person who passed over the will takes possession of the inheritance, not alone but along with someone else, Julian says most correctly, and Marcellus also approves his view, that an *actio utilis* for legacies ought to be given against him also; for the fact should not be cast aside that the act of the appointed heir, who also obtained the benefit of it, was prejudicial to him. But this is so only if the person who passed over the will did not receive a money consideration; for then he will be liable for the whole amount. 1. When legacies had been left to substitutes charged on the institutes and both the institutes and the substitutes, having passed over the will, are in possession of the inheritance on intestacy, the deified Pius stated in a rescript that the institutes were neither dishonest nor ill-advised in refusing to pay the legacies given to the substitutes; for they are right to object to a claim for legacies or *fideicommissa* being granted against them to a substitute, who was free, by accepting the inheritance, not to claim a *fideicommissum*, but to obtain the whole estate. 2. If there are two heirs, an institute and a substitute, and both, passing over the will, are in possession of the inheritance on intestacy, it is open to debate whether both are compelled to pay the legacies and whether each is compelled to pay those legacies which were charged on him or rather both are compelled to pay both sets of legacies. I think that a claim for the legacies should be given for the whole amount against the individual heirs; but let us consider whether it is for those legacies which were charged on him or rather also for those which were charged on the other heir. And, putting it another way, let us suppose that the institute possesses the inheritance alone; will he be liable to an action for those legacies which were charged on him, or also for those which were charged on the substitute? It must be held that he is only liable for those also, if the inheritance comes to the institutes by the fraud of the substitute without payment; for if the substitute was paid, he himself will be able to be sued. Again, if the substitute were in sole possession, if it was for a money considera-

tion that the institute had passed over [the will], we shall hold that the institute ought to answer to his own legatees and the substitute to his; but if it was without a money consideration, we shall give an action against the substitute. Now when both are in possession, it will be better held that the individual [heirs] ought to answer to their own legatees.

11 JAVOLENUS, *Letters, book 7:* If the same thing has been left to me charged on the institute and the substitute and they take possession of the estate as *legitimi heredes*, passing over the will, even though the whole amount is due to me from both, nevertheless, if I have obtained the legacy from one, I shall not be able to claim it from the other; I shall, therefore, be able to choose a defendant.

12 ULPIAN, *Edict, book 50:* In this case, the question has been asked about [grants of] freedom also, [namely], whether both those charged on the institute and those charged on the substitute are effective. And the preferable view is that they are effective, both those given directly and those given by *fideicommissum*. 1. It is agreed that the heir of a person who takes possession of an inheritance on intestacy, passing over the will, is liable in full in an action for the legacies; for it is the preferable view that it contains a claim for the thing rather than a penalty and therefore that it is also subject to no time limit. However, this is so only if the heir is not being sued because of the deceased's fraud; for then he would be sued for the benefit which he received.

13 GAIUS, *Provincial Edict, book 17:* Although someone takes possession on intestacy, not of the whole inheritance or the share of it to which he was instituted heir, but of the tiniest portion or even some single thing, he is liable under this edict,

14 GAIUS, *Edict of Urban Praetor, book 2, Wills:* although a single thing is not properly to be regarded as making a share of the inheritance.

15 GAIUS, *Provincial Edict, book 17:* And that is not inequitable as each person is saddled with this disadvantage through his own wrongdoing.

16 GAIUS, *Edict of Urban Praetor, book 2, Wills:* For as an inheritance can also be claimed from a person who possesses some one thing as part of the inheritance, there ought to be no doubt that what we have said is true.

17 GAIUS, *Provincial Edict, book 17:* If a person, having passed over the will, does not in any circumstance take possession of that inheritance, the legatees are excluded; for everyone ought to be free to pass over even a profitable inheritance, although legacies and [grants of] freedom thereby fall. But in the case of fideicommissary inheritances, provision has been made that if the appointed heir did not want to accept the inheritance, he accepts on the instructions of the praetor and hands it over; and this benefit has no more been granted to those to whom individual things have been left by *fideicommissum* than [it has] to legatees.

18 GAIUS, *Edict of Urban Praetor, book 2, Wills:* If two instituted heirs both possess the inheritance on intestacy, having passed over the will, then, because each is treated in praetorian law as if he had accepted the inheritance under the will, an action is competent against the individual heirs in proportion to their shares. 1. We must give a reminder that the benefit of the *lex Falcidia* must be conceded to the person against whom an action for the legacies is given under this part of the Edict.

19 GAIUS, *Provincial Edict, book 17:* Furthermore, if a patron who has been instituted heir to the whole estate has taken possession of the inheritance on intestacy, he also ought to have preserved to him the advantage of the share due to him which he would have had if he had accepted the inheritance under the will.

20 ULPIAN, *Disputations, book 4:* If the same thing has been left to different persons, charged on the institute and on the substitute, not both, but only he who received it from the institute, will bring a *vindicatio* for it.

21 JULIAN, *Digest, book 27:* If my son has been appointed heir by his mother and I, having passed over the will, have applied for *bonorum possessio* in name of the same son, the action for the legacies ought to be given against me, no differently than if I, having myself been appointed heir, had obtained *bonorum possessio* on intestacy, after passing over the will.

22 JULIAN, *Digest, book 31:* If the following was written in a will, "let Titius be heir;

if Titius becomes heir, let Maevius be heir," and Titius, having passed over the will, has taken possession of the inheritance as *legitimus heres*, the *hereditatis petitio* ought not to be given to Maevius against him in respect of the share which he would have had if the will had not been passed over. For as the inheritance is possessed with the will passed over, account must certainly be taken of the legacies and [grants of] freedom, because they could not be charged on anyone other than the heir; but the praetor ought not to take account of an inheritance which was given in this way; for it was by his own fault that the testator gave a share of the inheritance under this condition, when he could have given it unconditionally. 1. And, hence, even if the will had been written as follows, "let Titius be heir; whichever of those above-written becomes heir to me, let Stichus be free and heir," and Titius takes possession of the inheritance, having passed over the will, the praetor ought not to protect the freedom given to Stichus nor grant him a *hereditatis petitio*. 2. If a person has written his will in this way, "let Titius be heir; if Titius does not become heir, let Maevius be heir; whichever of those above-written becomes heir to me let him give a hundred to Maevius, if he does not become heir to me," and then Titius, having passed over the will, takes possession of the inheritance as *legitimus heres*, the question arises whether an action for legacies should be given to Maevius in whose power it was by accepting the inheritance under the substitution to acquire the whole inheritance. And it is settled that it should be given, because nothing prevents Maevius from having had just cause for not wishing to be involved in the affairs of the inheritance.

23 ULPIAN, *Edict, book 46:* If a son, who remained in his father's power, and also a daughter, who were instituted heirs, while their emancipated brother, who could have obtained *bonorum possessio contra tabulas*, was passed over, have obtained possession of their father['s estate] as on intestacy, they will pay legacies to everyone, and the daughter will not collate her dowry in favor of her brother, as she is regarded as holding the inheritance as appointed heir.

24 PAUL, *Edict, book 60:* If by the fraud of his tutor a *pupillus* has passed over a will and possesses the inheritance as *legitimus heres*, an action for the legacies must be given against the *pupillus*, but to the extent to which the inheritance has been acquired by him. For what if he is in possession of the inheritance along with someone else? 1. But most authorities think that this rule must be applied in the case of someone who is *pubes* also, so that he is liable in proportion to the share of which he has possession, although the praetor gives an action against him exactly as if he had accepted the inheritance.

25 CELSUS, *Digest, book 16:* A person to whom his own slave was substituted instructed his slave to accept [the inheritance]. If he did so in order that he should not have to pay the legacies, he will pay both [sets of legacies] in that he is both heir and possesses the inheritance under the substitution, having passed over the will, but he retains the benefit of the *lex Falcidia*.

26 PAPINIAN, *Questions, book 16:* Julian writes that a father who has instructed his daughter, who was substituted to him, to accept the inheritance, will, as the edict is to be understood, pay the legacies which were charged on himself, because the daughter is substituted to her father in case of accident, not in order to provide an opportunity for choosing; but if different legacies have been given exceeding three quarters [of the estate], account must first be taken of those which were charged on the daughter. For the father is not free from fraud in that he preferred to take up the institution of someone else for gain, neglecting his own honor. 1. But then, if the father, being substituted to the daughter, accepted the inheritance, Julian thinks that he did not act fraudulently in any way, because no one in substituting a father to his daughter, is regarded as interfering with the desires of parents, but as providing an opportunity for choosing.

27 PAPINIAN, *Replies, book 6:* A mother, substituted to her *impubes* son in *secundae tabulae* brings the edict into operation if she takes possession of her son's inheritance as *legitima heres*, passing over the will. The law will be the same also if she has been made heir to her son and substituted. 1. A brother was not regarded as having fallen foul of the intent of the edict on account of the legacies involved, when he did not emancipate his son, who was substituted to an *impubes* in the will of his brother, but entered on possession on intestacy through him. 2. On the basis of the praetor's intent, an action for the legacies will be given against a person who has not been appointed heir in a will, if he takes sole possession of the inheritance as *legitimus heres* with fraudulent intent, shared by the appointed heirs.

28 MAECIANUS, *Fideicommissa, book 4:* If a master, who had himself been requested to pay a *fideicommissum*, has sold the slave who was instituted heir before he gave him instructions to accept [the inheritance], he ought to pay it, as, through the price of the slave he also obtains the value of the inheritance. 1. If a person, instituted heir and asked to hand over the inheritance, having passed over the will, takes possession of the inheritance as *legitimus heres*, undoubtedly, as he is compellable to hand over the legacies and the other *fideicommissa*, so he is compellable to hand over the inheritance also and also [the grants of] freedom, both direct and fideicommissary. But if he has been asked to manumit slaves belonging to someone else, certainly he will have to buy them in. But the person to whom the inheritance has been handed over will suffer the same deduction as the person who handed it over to him would have had to suffer.

29 ULPIAN, *Fideicommissa, book 5:* A person who takes possession of an inheritance on intestacy, having passed over the will, ought to see that slaves have their freedom, so that the act of a person who was not willing to accept [the inheritance] under the will does not prejudice them; but in such a way that he has freedmen.

30 HERMOGENIAN, *Epitome of Law, book 3:* A person who, having passed over a will, possesses the inheritance as purchaser or as a dowry or as a gift or under any other title except as heir or as possessor, is not open to action by the legatees and fideicommissaries.

5

THE *SENATUS CONSULTUM SILANIANUM* AND THE *SENATUS CONSULTUM CLAUDIANUM*; THOSE WHOSE WILLS MAY NOT BE OPENED

1 ULPIAN, *Edict, book 50:* As no home can be safe except if slaves are compelled to guard their masters both from members of the household and from outsiders at the risk of their own lives, *senatus consulta* have been introduced concerning the questioning on public authority of the household slaves of those who have been killed. 1. The term "master" covers the person who has the ownership, even if someone else holds the usufruct. 2. A person who has possessed a slave in good faith will not be covered by the term "master," nor will one who only held a usufruct. 3. A slave given in *pignus*, so far as the death of the debtor is concerned, is treated in every respect exactly as if he had not been given in *pignus*. 4. The term "slaves" covers even those who have been left by legacy under a condition; for in the meantime they belong to the heir, nor does the fact that fulfillment of the condition means that they cease to belong to the heir cause them not to be regarded as his meanwhile. And the same must be held in the case of a *statuliber*. 5. But in the case of a slave to whom freedom is due unconditionally under a *fideicommissum*, there exists a rescript of the deified Pius addressed to Juventius Sabinus in which the view is made known that there should be no haste in applying torture to one to whom freedom is due under a *fideicommissum*; and the preferable view is that he should not be punished on account of having been under the same roof unless he was an accomplice in the crime. 6. It must be held that the term "master" covers even one who owns a share. 7. The term "master" covers a son-in-power and the other children who are in [parental] power for the *senatus consultum Silanianum* relates not only to heads of households but also to children. 8. And then, what shall we hold if the children are not in power? Marcellus, in the twelfth book of his *Digest*, is doubtful; I think that it is to be taken in a wider sense, so that it relates also to those children who are not in power. 9. We do not think that the *senatus consultum* applies to a person who has been given in adoption, although it applies to one who has been adopted. 10. But there is no place for the *senatus consultum* in the case of the killing of a foster child either. 11. There will be no questioning of the slaves of the mother if a son or daughter has been killed. 12. Scaevola elegantly remarks that if the father is in captivity, the slaves must be questioned and executed if a son has been killed; and he approves this as applying even after the father's death if the son has been killed before he becomes his

suus heres. 13. The same Scaevola remarks that the view should be quite firmly maintained that if the son was instituted heir, those who were unconditionally left by legacy or manumitted should be questioned and executed, if the son has been killed before acceptance of the inheritance; for, he says, although, if he were alive and became heir, they would not have been his, nevertheless, where he has died, and thereby legacy and freedom have been extinguished, there will be room for the *senatus consultum*. 14. If a father has been killed should the slaves of a son be questioned if it happens that he had slaves in his *peculium castrense*? And the preferable view is that the slaves of a son should be questioned and executed, even if the son is not in parental power. 15. If the case be that a husband or wife has been killed, their slaves are questioned, although neither can the slaves of the husband properly be called the slaves of the wife nor can those of the wife be called the slaves of the husband; but because their household slaves are mingled and there is only one house, the senate resolved that the same punishment was appropriate as in the case of their own slaves. 16. But the senate resolved that there should be no questioning of the slaves of the father-in-law when either a wife or a husband was killed; however, Marcellus has rightly held in the twelfth book of his *Digest* that the same should apply in the case of the slaves of the father-in-law also, as in the case of a husband. 17. Labeo writes that the term "killed" covers those who have been killed by force or by a wound, where, say, their throats have been cut, they have been strangled or thrown down, or struck by a rock or a club or a stone, or killed by some other weapon. 18. But if someone has been done away with, say, by poison or even some other means which usually kills secretly, the punishment of his death will not be a matter for this *senatus consultum*; and this because slaves are to be punished because they did not give assistance to their master whenever they could have given him help against force and failed to do so; but what could they have done against those who attack secretly with poison or in some other way? 19. Obviously, if poison has been administered by force, the *senatus consultum* applies. 20. Therefore, wherever force has been used which normally brings about death, it must be held that there the *senatus consultum* will apply. 21. What, then, if the case is put that a master has been killed by poison, not through force? Will the act go unpunished? By no means; for although the *senatus consultum Silanianum* is not applicable and there will be no questioning and execution of those who were under the same roof, nevertheless, if there were any who were privy to or authors of the crime, those alone will be executed; and the inheritance can be accepted, and the will opened even before any inquiry is held. 22. If a person has committed suicide the *senatus consultum Silanianum* does not, indeed, apply, but his death is punished, in this sense, namely, that if he did the deed in the sight of his slaves and they could have prevented his cruel attack on himself, a penalty is inflicted on them, but if they could not, they are freed. 23. If a person has committed suicide, not through fear of imminent exposure of a crime, but because weary of life or unable to bear pain, the way in which his death happened does not hinder the opening and reading out of his will. 24. Again, it should be noted that unless it is agreed that someone was killed, there is no questioning of the household; it, therefore, must be clear that he was killed by a criminal act if the *senatus consultum* is to apply. 25. However, we understand "questioning" to mean not only torture but all investigation and inquiry into the death. 26. However, this *senatus consultum* punishes those who were under the same roof in every case, but those who were not under the same roof but in the same district, only if they had been privy to the killing. 27. But let us consider how we are to understand "the same roof." Does this mean within the same walls, or, beyond that, within the same living room or bedroom or the same house or the same park or the whole country house? And Sextus says that it has often been decided by judges that whoever were in such a position that they could hear a cry are to be punished as having been under the same roof, although some people have stronger voices and others weaker ones and everyone cannot be heard everywhere. 28. Nevertheless, in this connection, it appears that the deified Hadrian also issued a rescript in the following terms: "Whenever slaves can give assistance to their masters, they ought not to prefer their own safety to his; but it is manifest that a slave-girl who was in the same room as her mistress

could have given assistance in the matter, if not by physical act, then certainly by wailing so that those who had been in the house or nearby might hear, and this by the very fact that she has said that the murderer had threatened her with death if she cried out. She ought, therefore, to suffer the supreme penalty if only so that all other slaves may not think that when their masters are in danger each should look after himself." 29. This rescript contains many points; for it allows a slave who was in the same room no excuse; and it does not spare one who was afraid to die; and it shows that slaves ought to give their masters assistance even by their cries. 30. If a person living in a country house has been killed, it is more than inequitable that all the slaves who were in that district should be questioned and executed, if, perhaps the country house has fields attached to it which are widely scattered; it is sufficient, therefore, if those who were with the person who is said to have been killed and will appear to be under suspicion of having done the killing or of being privy to it are questioned. 31. When a master had been killed on a journey, those who were along with him when he was killed, or who fled when they had been with him, must be executed. But if no one was with the master when he was killed, those *senatus consulta* are not applicable. 32. A slave who is *impubes* or a slave-girl who is not yet capable of sexual intercourse will not be treated in the same way [as adults]; for their age deserves to be excused. 33. However, should we spare an *impubes* from execution only, or also from the questioning as well? And the preferable view is that an *impubes* should not be questioned either; in other circumstances, also, it is observed as the usual rule that *impuberes* are not tortured; normally, they are merely frightened and beaten with a strap or a cane. 34. However, slaves who gave help are excused if it was not done fraudulently; for if anyone has pretended that he was giving help or gave it as a mere gesture, his contrivance will do him no good. 35. But it is not only a slave who has preserved his master, that is, one who was able to give help in such a way that his master was saved, who is regarded as having given assistance, but also one who did whatever he could, although his master was killed, for example, if anyone shouted to get help or frightened the attackers and if anyone gathered a crowd or if he interposed his body or gave assistance with his body in some other way. 36. Nevertheless, someone who made a noise is not always regarded as having given assistance; for what if he chose to make an empty noise when he could avert the danger from his master with his hand? That man will indeed be punishable. 37. What if slaves have been wounded when they were protecting their master? It must be held that they ought to be spared, unless they either inflicted these wounds on themselves, doing their best to avoid punishment, or received wounds such that they nevertheless could have given help, if they had wished. 38. If a mortally wounded master has survived and has made no complaint about any of his slaves, even if they were under the same roof, nevertheless, they ought to be spared.

2 CALLISTRATUS, *Judicial Examinations, book 5:* The deified Marcus Commodus addressed a rescript to Piso in the following terms: "As it has been established before you, dearest Piso, that Julius Donatus, after he had fled his country house, terrified by the arrival of robbers, was wounded and then, after making his will, had acknowledged that his slaves had done their duty, neither a sense of duty in relation to slaves nor the anxiety of the heir ought to lead to those whom the master himself absolved being brought to punishment."

3 ULPIAN, *Edict, book 50:* If someone suffering from a serious illness could not give help to his master, he must be protected. 1. If someone, when dying, said that he had been forcibly done to death by a slave, it must be held that the master is not to be believed if he said this when dying, unless it could also be proved. 2. If a husband has killed his wife, who was sleeping with him, at night inside the bedroom, or a wife her husband, the slaves will be freed from the penalty of the *senatus consultum.* But if they heard and did not give help, they will have to be punished, not only if they were the wife's own but also if they were the husband's. 3. Nevertheless, if a husband kills her caught in adultery, because he is excused, it must be held that the slaves, not only of the husband but also of the wife, are to be freed if they did not resist a master satisfying his just resentment. 4. If, when all his masters were undergoing an attack, a slave gave help to one, is he to be excused or, instead, to be punished because he did not give it to all? And the preferable view is that if

he could in fact have helped all, although he helped some, he must suffer execution; but if he could not help all of them at once, he must be excused, because he gave help to some. For it is hard to say that if, when he cannot give assistance to two, he chose to be of assistance to one, he committed a crime by his choice. 5. And, therefore, also if a slave of a wife preferred to be of assistance to his mistress's husband than to his mistress or vice versa, it must be held that he ought to be excused. 6. Protection is given to those who, at the time when their master or mistress was killed, were so shut up, without fraudulent intent, that they could not have broken out to bring help or to apprehend those who committed the murder; and it does not matter by whom they may be shut up; nevertheless, this applies only if they did not set out to be shut up in this way because they wished not to be able to give help. We must treat them as shut up also, if they have been tied up, provided that they have been so tied up that they could not in any circumstances break their bonds and be of assistance. 7. Those who are weakened by age are also excused. 8. A deaf slave is also to be counted among the helpless or among those who are not under the same roof, because, as those hear nothing because of distance, he hears nothing because of a deficiency. 9. A blind slave also ought to gain pardon. 10. In the same way, we except a dumb slave, but only where shouting was the only form of assistance possible. 11. There is no doubt at all that lunatics are excepted. 12. If anyone has received any of them, slave or slave-girl, from that household, who turns out to be guilty of that crime, or has concealed them knowingly with fraudulent intent, he is in the same position as if he were guilty of a crime under the statute which was passed concerning murderers. 13. If a slave is owed under a stipulation and he denounced the murder of his master and for this he was ordered to be freed as a reward, an action is not given to the stipulator on the stipulation; for even if he had been executed he would not be delivered either. But if he was not under the same roof, an action on the stipulation to the value of the slave will be available to the creditor. 14. But is a slave regarded as having given information or as having denounced the crime only when he thrust himself forward of his own accord to do so or also when, being himself accused, he turned the accusation of the crime against someone else? And the preferable view is that the man worthy of this reward is one who thrust himself forward to make the accusation of his own accord. 15. Those also who could not otherwise attain freedom, where, say, someone had been sold on the terms that he should not be manumitted, will be able to attain freedom because of this, because it is useful to the community. 16. Those slaves also who were manumitted by the will are to be executed just as if they were slaves. 17. Those slaves who had fled before the will of the master or mistress who was killed was opened and who afterward, when the will was opened, were found to have been given their freedom are to be questioned and executed just as if they were slaves; for it is most equitable that the indulgence of masters, which the more fully each had experienced, the more severe penalty he will deserve for his crime, should not stand in the way of their being avenged. 18. It is provided in the edict that no one shall, knowingly and with fraudulent intent, see to the opening, reading out, and copying of what has been left by way of testamentary disposition by someone who is said to have been killed, before questioning of that household under the *senatus consultum* has taken place, and the guilty parties have been executed. 19. But in this context, a person is regarded as "opening" when he opens [the tablets on which the will is written] in the natural sense whether they have been sealed or not sealed, but merely closed in the natural sense. 20. We must regard ourselves as prohibited from opening [the will] in front of others and publicly or secretly; for all opening is prohibited. 21. If someone has opened [the will] in ignorance that the deceased was killed he ought not to be liable under this edict. 22. And if he opened [the will] knowingly, but not fraudulently, he will equally not be liable, where, perhaps, he opened [the will] in ignorance of the praetor's edict or the *senatus consultum* because of inexperience or rusticity. 23. If a person did not in fact open the tablets [of the will] in the natural sense, but cut the thread [joining them], he will be excused because he is not fraudulent in that he did not open the tablets themselves. 24. But if it is not the whole will, but a part of it, which has been opened, it must be held that the person who did the opening has contravened the edict; for it matters little whether the whole or a part is opened. 25. If a person has opened a codicil but not a will, he contravenes the edict; for a codicil also relates to testamentary disposition. 26. Again, whether what has been opened is legally valid or not, the edict nevertheless applies. 27. The

same rules are observed in matters relating to a substitution where a *pupillus* or *pupilla* is said to have been killed. 28. If one person opened [the will], another read it out, and another copied it, all who did these individual acts will come within the edict. 29. Not only an inheritance under a will but also one on intestacy is covered by this edict, so that no one should accept it or claim *bonorum possessio* before the questioning of the household takes place, lest the heir should have concealed the crime of the household for his own profit. 30. Scaevola elegantly remarks that in order that a person may transmit *actiones utiles* to his heir, if it happens that he has died before acceptance [of the inheritance], it must be established that the reason why he did not accept was that he was afraid of the *senatus consultum* and the edict. 31. If persons instructed to meet a condition within a prescribed time limit from the date of the death have failed to do so because of ignorance and if the reason for their ignorance was that the tablets [of the will] could not be opened for fear of the *senatus consultum*, they are protected in the matter of fulfillment of the condition. 32. If there should be another impediment to acceptance of the inheritance or opening the will and also the *senatus consultum*, the impediment created by the *senatus consultum* does not count so long as there was also another; if, for example, the wife of the person killed was pregnant, or even was thought to be so, and therefore the institute could not accept the inheritance.

4 PAPINIAN, *Replies, book 6:* A person who had instituted *postumi* as heirs, appointed his wife heir in the second degree if *postumi* were not born; when he was said to have been killed by his household [slaves], his wife had died; the heirs of the wife applied to have actions given to them under the constitution. I advised that they should only be heard if the wife, when it was established that she was bearing no child in her womb, did not wish to accept the inheritance because of the *senatus consultum*; otherwise, if she died pregnant, no complaint of a wrong had been founded.

5 ULPIAN, *Edict, book 50:* I think that *necessarii heredes* are included in the edict, if they intermeddle with the inheritance. 1. The praetor does not allow *bonorum possessio* to be claimed either; and I think that this edict relates to all forms of *bonorum possessio*. 2. The property is not confiscated unless it is established that the head of the household was killed and the heir had accepted the inheritance before the household slaves were questioned and executed. 3. Where someone has been killed by negligence or the trickery of a doctor, the inheritance can indeed be accepted, but it falls to the heir to have the death punished.

6 PAUL, *Edict, book 46:* Although the murderer is certain, there must still be an investigation to find out the author of the murder; but he [the murderer] especially will be put to the question although the others are punished as well. 1. Although slaves are not in other circumstances tortured when their master's life is at stake, nevertheless, it will be right to hold an investigation, even although they accuse the heir, whether he is an *extraneus heres* or one of the *sui*. 2. If one of the masters does not appear, an investigation is to be made of his fate through the slaves whom they held in common; for it is preferable that they be tortured in the matter of the safety or avenging of the master who does not appear than to the risk of the life of one who is present. 3. If a master has been attacked and not killed, there is nothing provided in the *senatus consultum*; for he can himself punish his household slaves.

7 PAUL, *Senatus Consultum Silanianum, sole book:* And he will have extraordinary help against freedmen.

8 PAUL, *Edict, book 46:* It is provided in the *senatus consultum Pisonianum* that if a slave liable to punishment has been sold, whenever punishment has been inflicted on him, the seller should pay up the price, so that the senate may not be regarded as having inflicted a wrong on the buyer. 1. If a son-in-power who has made a will affecting his *peculium castrense* has been killed, in all circumstances the view to be defended is that in the cases in which the property of a head of a household goes to the imperial treasury, in those cases his *peculium* also goes to it rather than to the heirs who committed a wrong in accepting and similar matters or have not avenged [the death].

9 GAIUS, *Provincial Edict, book 17:* When the caduciary property of a deceased person is assigned to the imperial treasury because of an unavenged death, an action is given against it for the legacies; and [grants of] freedom are ratified, made to those, of course, who are excepted from the *senatus consultum*.

10 PAUL, *Senatus Consultum Silanianum, sole book:* If a disinherited son has been killed before his father's inheritance was accepted, the case will be looked at according to the way the facts turn out, so that if the inheritance has been accepted, they are regarded as if they had belonged to someone else; but if the will has been avoided, because they would have been his if he had lived, everything is dealt with as if he were owner. 1. Under the deified Trajan, it was provided by *constitutio* that those freedmen whom he [the deceased] had manumitted while alive are to be questioned.

11 TRYPHONINUS, *Disputations, book 2:* And it will be the same with regard to those who had applied for the *jus anulorum* also.

12 PAUL, *Senatus Consultum Silanianum, sole book:* If a slave has been left by legacy by a testator who has been killed and the praetor has provided that he be free as a reward, it must be held that there is no impediment to his freedom.

13 VENULEIUS SATURNINUS, *Criminal Proceedings, book 2:* It was provided by a *senatus consultum* in the consulship of Taurus and Lepidus that a prescriptive period of five years should apply to a *cognitio* on the opening, contrary to the *senatus consultum*, of the will of a person who is said to have been killed by his household slaves; but this relates to outsiders. For by the same *senatus consultum* it is permitted to bring an accusation without limit of time against those who can be held liable for parricide.

14 MAECIANUS, *Criminal Proceedings, book 11:* Slaves who are *impubes* are excepted from the *senatus consultum Silanianum.* But the legate Trebius Germanus ordered even an *impubes* to be executed, and yet not without reason; for that boy was not far off the age of puberty and had been lying at his master's feet when he was killed and had not made his murder known afterward. For while it was agreed that he could not have given assistance, at the same time it was certain that he had kept silence even afterward, and he believed that only those *impuberes* who had merely been under the same roof were spared by the *senatus consultum*; while those who had been personal attendants or participants in the murder and were of an age when, although not yet *pubes*, they could form an understanding of the matter, ought not to be spared any more in the murder of their master than in any other case.

15 MARCIAN, *Informers, sole book:* If the [heir in the] subsequent degree has avenged the death of the testator, is the inheritance transferred from the previous one to him? And Papinian says that this is not [so]; for the penalty of the former should not be the reward of the latter. 1. When a legacy had also been left to a person who was instituted heir in respect of a share and he had done nothing about avenging the death [of the testator], the deified Severus and Antoninus stated in a rescript that both the share of the inheritance and the legacy should be taken away from him. 2. However, the property is taken away from heirs who had done nothing about avenging the death of the deceased, whether heirs on testacy or intestacy, perhaps even if he has come in as patron, although these are admitted in their own right.

16 MARCELLUS, *Digest, book 12:* Where a master was killed by his household slaves, a slave held in common exposed his murder; he certainly must be freed in order to favor freedom, but the co-owner ought to obtain the value of the share which falls to him.

17 MODESTINUS, *Rules, book 8:* First, the household slaves are to be tortured with regard to their own acts and if they confess, then they are interrogated on the question by whose instructions the crime was committed.

18 MARCELLUS, *Rules, book 9:* The same person is not prohibited from both complaining about an undutiful will and avenging the death of the deceased; and Paul gave this advice when consulted.

19 MODESTINUS, *Encyclopaedia, book 8:* When a master is being killed, the household ought to give him assistance, with weapons, with their hands, by shouting, and by interposing their bodies; but if, when they could do so, they did not help they are deservedly executed.

20 PAPINIAN, *Replies, book 2:* An heir who is bringing a case of poisoning is not prohibited from settling urgent matters relating to the inheritance, if he does not destroy means of proof.

21 PAPINIAN, *Replies, book 6:* The time for applying for [*bonorum*] *possessio* is not pro-

longed because of an investigation of a poisoning, as it is proper to apply for it even when that charge has been adjourned. The senate resolved otherwise when a master is said to have been killed by his household slaves, the reason being the slaves whose freedom it is necessary to disregard in order to make an investigation. 1. A granddaughter who had applied for [*bonorum*] *possessio* in respect of her grandmother's estate had knowingly not sought to avenge the death of her grandmother, who was murdered. It was settled that a *fideicommissum*, which the grandmother owed to her granddaughter under another will, should not be deducted when the property was handed over to the imperial treasury; for the fraud of the heir was [thus] punished. However, if the woman lost the benefit of the property by negligence, it is reasonable that the *fideicommissum* should be retained by restoring her right to claim. 2. Where the parties were accused of committing murder [on the deceased] and they were found not guilty by the unjust act of the governor, it was held that the inheritance ought not to be taken away from the heirs who had done their duty, not perfunctorily, although they had not appealed.

22 PAUL, *Replies, book 16:* When Gaius Seius was sinking toward death, he complained that he was killed by his slave with poison and so expired; his heir was his sister Lucia Titia and she failed to pursue the matter of his death and herself died ten years later; someone came forward to denounce the property of Gaius Seius [to the imperial treasury]; I ask whether the crime was extinguished by the death of Titia. Paul replied that as the case in question is pecuniary, it is not regarded as extinguished by the death of the ungrateful heir.

23 MAECIANUS, *Fideicommissa, book 13:* If, before it was disclosed that the testator was killed, the tablets of the will had been opened and then it became known that this crime was committed, I think that after a *cognitio* has been held, the institute is compellable to accept the inheritance which he said was suspect and to hand it over under the *senatus consultum Trebellianum.*

24 ULPIAN, *Edict, book 50:* If, under compulsion, a person accepts an inheritance claimed to be suspect, he is not liable under the edict.

25 GAIUS, *Provincial Edict, book 17:* In the *lex Cornelia* it is provided, with regard to the reward of an accuser who has sought out and denounced those slaves who fled from the household before their questioning, that he receives in respect of each of the slaves whom he has convicted five aurei from the property of the person killed, or if that sum cannot be raised from the property, from the public purse. And this reward is granted to the accuser, not in respect of all the slaves who were under the same roof or in the same place, but only in respect of those who committed the murder. 1. Furthermore, it is provided that in respect of those who fled before the questioning took place, if, on opening the will, they are found to have been granted freedom, a trial shall be held under the *lex de sicariis* in the form that they plead their case as prisoners and, if convicted, are punished as slaves, and there is to be given to the person who has obtained a conviction ten aurei in respect of each by way of reward from the property of the person condemned. 2. Under this edict, an action lies against a person who is said to have opened the tablets of a will or to have done anything else contrary to the praetor's Edict; for, as appears from what has been said above, there are several matters in respect of which the penalty under the Edict has been established. It is obvious, however, that it is a popular action, the penalty under which extends to one hundred aurei from the property of the person condemned; and of this the praetor promises that he will give one half share to the person by whose efforts a conviction was obtained, by way of reward, and will collect the [other] share into the public purse.

26 SCAEVOLA, *Digest, book 34:* Titius received from the heirs of Seius a *fideicommissum* which Gaius Seius owed Titius under the will of his cousin; when the heirs of Gaius Seius did not avenge the murder of Gaius Seius, the question was asked whether Titius nevertheless can accuse those heirs of being unworthy, on the ground that they did not avenge his death, and whether it is not an obstacle to him that he obtained from them a *fideicommissum* under the will of his cousin's brother. He replied that on the facts stated there was no reason why there should be an obstacle.

27 CALLISTRATUS, *Law of Imperial Treasury, book 1:* Where there are several heirs and the will has been opened against the wishes or without the knowledge of some of them, those who are not at fault do not lose their shares.

6

IF A PERSON HAS PROHIBITED SOMEONE FROM MAKING A WILL OR HAS COMPELLED HIM TO MAKE ONE

1 ULPIAN, *Edict, book 48:* The deified Hadrian laid down that a person who, in trying to obtain an inheritance, as *legitimus heres* or under a will, prohibited a testamentary scribe from entering when he wished to make or change a will ought to be denied actions and if actions were denied to him, a claim would open to the imperial treasury. 1. If a master has fraudulently acted so as to prevent a will in which his slave was appointed [heir] from being changed, although the slave has accepted the inheritance after manumission, actions are denied to him, as, even if something were given to his [the master's] children, it ought to be denied to them, even if they were not in parental power. But if a legacy has been left to him and he has been asked to hand it over [to someone else], it will be logical to hold that he is allowed to take the legacy which he himself had not had, but would have passed on to someone else. 2. If several heirs have been instituted and all have acted fraudulently so as to prevent the will being changed, it must be held that actions are denied to all of them because all acted fraudulently.

2 PAUL, *Edict, book 44:* If someone has acted fraudulently so as to prevent witnesses from coming and in this way the opportunity of making a will is lost, actions are to be denied to the person who acted fraudulently, whether he is *legitimus heres* or appointed under an earlier will. 1. However, a brother's act does not prejudice his brother. 2. If a *fideicommissum* to hand over the inheritance [to someone else] has been imposed on the person who committed fraud, that inheritance will become caduciary with its own burdens, so that the imperial treasury enjoys the benefit of the *lex Falcidia* but the fideicommissary that of three quarters [of the estate].

3 PAPINIAN, *Replies, book 15:* I advised that a husband who had intervened to prevent his wife from making a codicil when she had changed her intentions toward him to his disadvantage and who had used neither force nor fraud but, as commonly happens, had soothed the displeasure of his upset wife by talking to her as a husband, had not committed any crime and what had been left to him by will should not be taken away.

7

THE LAW OF CODICILS

1 ULPIAN, *Disputations, book 4:* It has very often been stated in rescripts and *constitutiones* that a person who thought that he was making a will and did not intend it to be valid as a codicil is not regarded as having made a codicil either; and, therefore, what has been written in that will, although it could be valid in a codicil, nevertheless is not due.

2 JULIAN, *Digest, book 37:* If something were given by *fideicommissum* in a codicil to a person born after a will was made and before the codicil was written, it is effective. 1. But if it had been given to a person who had died after the will was made and before the codicil was written, it is treated as if it had not been written. 2. A codicil has this peculiarity in law that whatever is written in it should be treated as if it had been written in the will. And, therefore, freedom is not properly given directly [in it] to a slave who had belonged to the testator at the time of making his will, but to someone else at the time of the codicil. And, on the other hand, if, when the will was made, he belonged to someone else and at the time of the codicil to the testator, freedom is understood as having been given to a slave belonging to someone else. And, therefore, although direct [grants of] freedom fail, nevertheless, resort must be had to fideicommissary ones. 3. A lunatic is not understood to make a codicil, because he is not understood to perform any other legal act, as in all circumstances and in every respect he is treated like someone absent or asleep. 4. An inheritance given invalidly by will cannot be confirmed as an inheritance in a codicil, but it is claimable under a *fideicommissum*, always taking account of the provisions of the *lex Falcidia*.

3 JULIAN, *Digest, book 39:* If a person, when he had no will, gave *fideicommissa* by codicil in the following manner, "whoever shall be my heir or *bonorum possessor*, I commit to his faith," the *fideicommissa* ought to be performed, because a head of a household who has *testamenti factio* and intended to make a codicil ought to be treated as if all of those to whom the inheritance would pass as *legitimi* or who might obtain *bonorum possessio* were his heirs. 1. But even if someone were born as nearest agnate or *suus heres* after the codicil was made, the *fideicommissum* ought to be performed; for he also is understood as being appointed heir and, therefore, is not to be treated as if he had broken this codicil. 2. Where a will has been made even if a codicil was not confirmed in it, nevertheless, it takes its force from it. Hence, if the inheritance was not accepted under the will, a *fideicommissum* under a codicil of this sort will be of no effect.

4 JULIAN, *Digest, book 63:* It has been settled that a person who is solvent at the time he makes a codicil properly makes a grant of freedom, although he was not solvent at the time when he made his will.

5 PAPINIAN, *Replies, book 7:* A codicil made before a will is not valid, except where, in the will which is made afterward, either the codicil is confirmed or the wishes expressed in it are adhered to, as shown by some evidence or other; but those provisions regarding which the deceased made a different last disposition will not be kept in force.

6 MARCIAN, *Institutes, book 7:* The deified Severus and Antoninus stated in a rescript that a mother who, when she instituted her children as heirs unconditionally, imposed a condition of emancipation in a codicil, achieved nothing, because it is not possible either to impose a condition on the instituted heir in a codicil or make a substitution to the direct heir. 1. A person can even make several codicils, and it is not necessary that they be either written or sealed by his own hand. 2. Although in a confirmation of codicils a head of a household has added that he does not wish any codicil to be valid except one sealed and subscribed in his own hand, nevertheless, a codicil made by him is valid, although it has been neither sealed by him nor written in his own hand; for what is done afterward derogates from what was done before. 3. Only a person who can also make a will can make a codicil. 4. If, after making his will, a person has left a legacy to someone who is dead by a codicil, even one confirmed by will, the legacy becomes as if it had not been written.

7 MARCIAN, *Rules, book 2:* Certain matters are not related to the [date of] confirmation of a codicil, for example, if a person has confirmed a codicil before he falls into captivity and writes a codicil in captivity; for it is not valid. It is the same if in some way he has ceased to have the right to make a will. 1. Furthermore, in respect of matters which are not of law but of fact, what is written in a codicil is not to be treated as if it had been written when confirmation was made; for example, if the following has been written in a codicil, "the clothing which is mine," the time at which the codicil was made is to be looked at, not the time at which it is confirmed; again, a legacy has been left in a codicil to Seius, "if Titius is alive" or "if he is aged such and such," the time at which the codicil was made is to be looked at, not the time at which the will was made.

8 PAUL, *Law of Codicils, sole book:* Codicils are set up in four ways; for they are confirmed for the future or for the past or, through a *fideicommissum*, when a will has been made or without a will. 1. But the reason why *fideicommissa* can be charged on those succeeding on intestacy is because the head of the household is understood as having, of his own free will, left them to take the inheritance as *legitimi heredes*. 2. A codicil is valid whenever a person can also make a will. Nevertheless, we will not understand this in the sense that we require that he could have made a will at the time when he writes that codicil; for what if he could not muster sufficient witnesses? But if he had *testamenti factio* by law. 3. If, after making a will, a person has confirmed a codicil, then has given himself in *adrogatio* and then has made a codicil and, having

been emancipated, has died in that situation, the question is asked whether legacies are due under the codicil; for the will is also valid, but he made it [the codicil] at a time when he did not have *testamenti factio.* And it is not like a dumb person who has properly confirmed a codicil; for although he cannot make a will, nevertheless, the will which he had made previously still stands, but this person's will has been removed, and he is making a will of property which in a certain sense belongs to someone else. But we shall hold that the codicil is valid; for even where a *postumus* born has broken the will and died, a codicil is nevertheless valid. 4. If a soldier made his will before military service but he made a codicil during his service, the question arises whether the codicil is valid by military law, because the will is valid under the general law, unless he sealed it during his period of military service or added something to it. Certainly, a codicil made during a period of military service should not be referred to the will, but is valid by military law. 5. If freedom is given by codicil to a slave who has received a legacy under a will, we shall hold that the legacy is effective, as if the legacy had been effective from the beginning. 6. If a person has confirmed a codicil of a certain kind, say, "which I made last," what is given in a codicil will certainly not be regarded as effective immediately, so long as another [codicil] can also be made, and, therefore, if another is made afterward, legacies given in the earlier one will not be valid.

9 MARCELLUS, *Digest, book 9:* Aristo said that a codicil, made by a person who did not know whether he was a head of a household or not, was not valid. ULPIAN notes: Unless he was a veteran, for then even a testament will be valid.

10 PAPINIAN, *Questions, book 15:* The rule traditionally handed down that an inheritance cannot be given by codicil has this reason to support it, that the will itself, which takes its force through the institution of heirs, should not be regarded as confirmed by a codicil which would derive its validity from the will.

11 PAPINIAN, *Questions, book 19:* A person who did not know that his wife was with child made [grants of] freedom in a codicil addressed to his son. It was decided that when a daughter was born after her father's death and it had been ascertained that the father had had no idea of her existence, the [grants of] freedom should be made by the son only; he could do so,

12 PAPINIAN, *Questions, book 22:* having bought in her shares from his sister.

13 PAPINIAN, *Questions, book 19:* For undoubtedly it cannot be said that the daughter also is compellable to manumit, as the father made no request to her and she became heir in her own right. 1. It is usual to discuss the question of a person who, when he had made no will, wrote in a codicil as follows: "I wish Titius to be heir," but it matters a great deal whether he left the inheritance as a *fideicommissum* charged on the *legitimus heres* by this writing, which he intended to treat as a codicil, or instead thought that he was making a will; for in the latter case, nothing will be claimable from the *legitimus heres.* However, the question of intention will generally be made clear from the writing in question; for if perhaps he left legacies charged on Titius, [if he perhaps] made an additional appointment as substitute if he had not become heir, undoubtedly he will be understood as having intended to make not a codicil, but a will.

14 SCAEVOLA, *Questions, book 8:* Certain authorities relate, as I repeat from Vivianus, that a controversy was revealed between Sabinus and Cassius and Proculus in a question of the following nature: whether legacies which have been added or adeemed by a codicil, after the institutes have died, are due from the substitutes, that is, whether the grant and ademption done even at this time by codicil is valid, as if it had been done by will. And they say that Sabinus and Cassius had given advice in this sense, with Proculus dissenting. However, doubtless the argument of Sabinus and Cassius, which they themselves report, is this, that a codicil is treated as part of the will and they carefully observe this principle and the legal implications of it. But I have made bold to say that the view of Proculus is the truest. For a legacy which has been given to a person who, at the time of [making] the codicil, is not alive is of no

effect, although he was alive at the time of [making the] will; for the person to whom the grant is being made must exist; then there comes the question whether what has been granted is effective, so that it is not necessary to look into the basis of his right before looking for the person concerned. And in the case put, therefore, what has been left by legacy or adeemed in a codicil after the death of the heir is of no effect, because the heir to whom he refers his statement is not in being and that ademption and grant is now made useless. This in relation to an heir who has been instituted to the whole estate with a substitute appointed [to him] in such a way that the codicil was confirmed in relation to the institute. 1. But if two people have been instituted with substitutes appointed to them, and one of them has died, the legacies are regarded as effective; but in relation to the co-heir, there will be a discussion whether he owes the whole legacy, if the legacy be given [in the form], "whoever becomes heir to me," or rather does not, because there is a substitute heir who makes him [only] a part-heir, although he himself does not owe [the legacy]. The same point can also be discussed with regard to debts expressly referred to. And I think the view that the co-heir alone owes the whole is much preferable because a person was added who, even at the time when he was added, was not in being.

15 AFRICANUS, *Questions, book 2:* But when the intention of the testator was that legacies be paid out of the whole inheritance, it must be held that the defense of fraud will be available to the appointed heirs, if more than their share of the inheritance is sued for.

16 PAUL, *Questions, book 21:* A successor of an intestate will owe what has been left by codicil made on intestacy even if he was born afterward; for whoever has succeeded on intestacy the codicil will take effect; for it is one eventuality, and it does not matter who succeeds provided that he succeeds on intestacy. But a codicil relates to a will which he [the testator] had made at any time. And if I may speak more plainly, if a head of a household has died intestate, a codicil requires nothing more but performs the function of a will; but if a will has been made, it follows its legal position.

17 PAUL, *Views, book 3:* A letter in which an inheritance is promised or intentions are expressed does not have the force of a codicil.

18 CELSUS, *Digest, book 20:* Plotiana to her friend Celsus, greetings. Lucius Titius drew a document in the following terms, thus: "If I have left anything in tablets or in any other form relating to this will, I wish it to take effect thus." I ask whether a codicil which was written before this will ought to be regarded as ratified. Juventius Celsus to his friend Plotiana, greetings. The words, "if I have left anything relating to this will, I wish it to take effect" cover also what was written before the will.

19 MARCELLUS, *Digest, book 14:* A man who had one son, after he had addressed a codicil to him, died intestate leaving him as heir and a son whom he begot afterward. No one would say that the codicil had become null by the addition of a *suus heres* to the agnatic family; therefore, if at that time he did not hope for *postumi*, the codicil is not nullified, and also the son to whom the codicil was addressed is compelled to pay what was left to the extent of one half, but not the *postumus* also. But even if a man dying with two sons surviving had left a codicil, when he thought that one of them had died previously, it can be held in the same way that everything is owed by the son to whom the codicil was addressed as if he had been his father's sole heir. No, indeed, he owes only a share; but in respect of those prestations which cannot be made in part, nothing of them is payable because he would not have intended to take them away from the son unless he thought that he would be his sole successor.

20 PAUL, *Lex Julia et Papia, book 5:* If the heir has been declared openly, but the legacies have been put into tablets, Julian says that the tablets in which the heir has not been appointed are not understood to be the tablets of a will so that they are to be regarded as a codicil rather than a will; and I think that this is the more correct statement.

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